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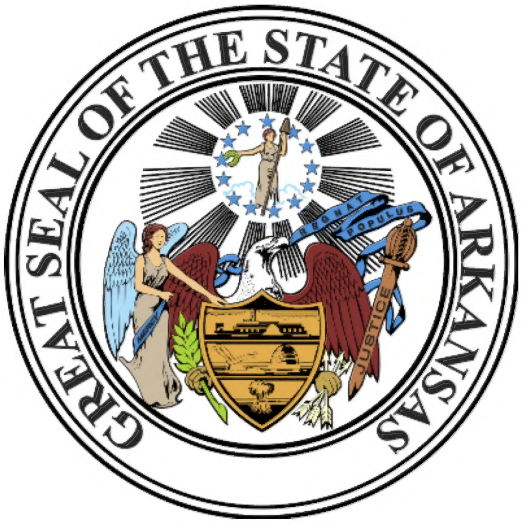
Chief Justice Roberts
Georgia, et. al., Petitioners v. Public.Resource.Org, Inc.
590 U.S. ___ ,140 S. Ct. 1498, 206 L. Ed. 2d 732



ARKANSAS MODEL JURY INSTRUCTIONS

Criminal, Volume 1

Second Edition

Arkansas Supreme Court
Committee on Criminal Jury Instructions

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ARKANSAS MODEL JURY INSTRUCTIONS

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on Criminal Jury Instructions

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March 8, 1994

Arkansas Supreme Court Committee
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Arkansas Bar Center
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Little Rock, Arkansas 72201

Dear Committee Members:

This court wishes to extend its deep gratitude to the members of the AMCI Committee for their countless hours and unselfish devotion expended in completing the 1994 revised edition of the Arkansas Model Jury Instructions -- Criminal. Your work represents an exhaustive effort to include all the new criminal legislative enactments and appellate decisions rendered since 1982, and we, along with the other members of the bench and bar, sincerely thank you for your unwavering commitment in compiling and publishing this book.

The original AMCI was researched and drafted commencing in 1970. It was finally published in 1979 and updated in 1982. Those efforts were the Supreme Court's and its AMCI Committee's first endeavors to prepare criminal pattern instructions which we hoped would serve to enhance the administration of criminal justice in Arkansas. That work product has been utilized over the past years and has indeed aided in facilitating Arkansas's criminal jury trial procedure and in reducing the number of errors when charging the jury. The present AMCI Committee's work will serve this same tradition commenced in the 1970's.

We again thank you for your time, energies and talent in giving us this excellent 1994 compilation of the AMCI.

Sincerely,

Chief Justice Jack Holt, Jr.

Justice Robert Dudley

Justice Steele Hays

Justice David Newbern

Justice Tom Glaze

Justice Donald Corbin

Justice Robert Brown

(Rel. 12-4/2020 Pub.60190)

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DEDICATION

This book is dedicated to the memory of Justice George Rose Smith, who ably served the Committee from its inception in 1970 until his retirement, and whose wit and discernment continue to provide inspiration.

INTRODUCTION TO THE FIRST EDITION

Few would dispute the need for fair, accurate, and uniform jury instructions. In 1965 the Arkansas Model Jury Instructions-Civil were published, and they have been of singular value to the bench and bar. Recognizing that uniform instructions are equally important in criminal cases, the Arkansas Supreme Court, by a per curiam order dated September 21, 1970, appointed a committee to draft model criminal instruction. This committee commenced its work in September 1970, but when it became apparent that a new criminal code would be enacted, the committee became inactive. After passage of the new criminal code in 1975, the committee, with a substantial change in membership, renewed its work.

The members of the committee gave unselfishly of their time, talent and energy during the years it took to finish this book. Meetings of the committee as a whole were held every third week end, and committee members were given homework for the interim periods. The members of the committee who completed this work were as follows:

William R. Wilson, Jr., Little Rock, Chairman

John C. Calhoun, Jr., Little Rock

Judge William H. Enfield, Bentonville

Professor Rafael Guzman, Fayetteville

Judge William Lee, Clarendon

Jack Lessenberry, Little Rock

Wayne Matthews, Pine Bluff

Frank Newell, Little Rock

Judge Harrell Simpson, Pocahontas

Justice George Rose Smith, Little Rock

Executive Secretary

Fredrick S. Ursery, Little Rock

Research Assistants

Thomas M. Carpenter, North Little Rock

Charles L. Carpenter, Jr., North Little Rock

The Honorable O. H. Hargraves of Forrest City served ably as our chairman for more than a year, but due to illness was forced to resign before the project was completed.

AMCI is designed to give the bench, bar, and juries an understandable and accurate statement of the law. It should reduce the amount of time spent in preparation of instructions as well as the number of appeals based upon alleged errors in charging the jury. In short, if AMCI accomplishes its mission, it will enhance the administration of criminal justice in Arkansas.

WILLIAM R. WILSON, JR., Chairman
Arkansas Supreme Court
Committee on Criminal Jury Instructions

Little Rock, Arkansas

January 1, 1979

INTRODUCTION TO 1982 REVISIONS

In May of 1981 the AMCI Committee reconvened to consider revisions made necessary by the 1979 and 1981 legislative sessions.

Since the original project was completed, the Honorable Harrell Simpson of Pocahontas resigned, and death claimed the Honorable William Lee of Clarendon. William R. Wilson, Jr., of Little Rock, who had served so ably as chairman of the Committee, also resigned. The Supreme Court appointed Wayne Matthews of Pine Bluff as chairman and Stephen Engstrom and Thomas M. Carpenter of Little Rock as members of the Committee.

The Committee was able to complete the extensive revision in July of 1982 and plans to reconvene in 1983 if necessary.

Wayne Matthews, Chairman

Arkansas Supreme Court

Committee on Criminal Jury Instructions

INTRODUCTION TO THE SECOND EDITION

Since the 1982 revisions to the original edition of AMCI, extensive changes have been necessitated by recodification, reclassification, and bifurcation as well as the normal processes of legislative and judicial action. Numerous stalwarts from the original Committee have been ably assisted by industrious additional appointees in the effort to incorporate those changes into this new edition. The Committee has attempted to adhere to the same principles and practices followed in the prior works and hopes that the users of this edition will find it as useful as its predecessors.

The members of the Committee who completed this work are as follows:

John C. Calhoun, Jr., North Little Rock, Chairman

Charles (Larry) Carpenter, Jr., North Little Rock

Thomas M. Carpenter, Little Rock

Judge William H. Enfield, Bentonville

Justice Thomas A. Glaze, Little Rock, Supreme Court Liaison

Jackson Jones, Little Rock

Judge John Dan Kemp, Mountain View

Jack Lassiter, Little Rock

Judge Jack L. Lessenberry, Little Rock

Wayne Matthews, Pine Bluff

Frank B. Newell, Little Rock

Didi H. Sallings, Little Rock

R. Christopher Thomas, Little Rock, Committee Liaison

Frederick S. Ursery, Little Rock, Executive Secretary

John C. Calhoun, Jr., Chairman, Arkansas Supreme Court Committee on Criminal Jury Instructions

HOW TO USE THIS BOOK

This new edition contains extensive modifications necessary by numerous substantive changes in the law since publication of the last edition and, especially, by 1993 Ark. Acts 551. That act, for the most part codified at Ark. Code Ann. §§ 5-4-103 (Repl. 1993) and 16-97-101 to -104 (Supp. 1993), sets out Arkansas' new bifurcated trial procedure. Section 7 of Act 551, which is uncodified, provides: "The bifurcation procedures in Sections 1 and 2 of this act shall become effective on January 1, 1994 . . . ." Because the act has procedural effects only and does not affect, for instance, the length of the sentence that may be imposed, the Committee's view is that the act applies in felony jury trials commencing on or after January 1, 1994, regardless of when the offense is alleged to have been committed. *See Jennings vs. State*, 276 Ark. 217, 633 S.W.2d 373 (1982), construing Ark. Const., art. 2, § 17.

Under previous law, jury verdicts often did not contain explicit findings of fact. Findings could, however, be inferred from the verdict form selected. For example, a jury returning a conviction in a theft case where the value of the property stolen had been drawn in issue simply came in with a verdict of guilty and a sentence to a term of imprisonment or a fine. From the verdict form chosen, one could deduce the jury's unstated finding with respect to the value of the property. Under the methodology chosen to give effect to the bifurcation requirements of Act 551, the jury will perform the same functions as in the past, but it will also make explicit findings on disputed fact issues.

The methodology chosen breaks the trial into two stages: (1) guilt determination and (2) sentencing. In stage one of a theft trial involving a dispute over the value of property taken, the jury will not only make a finding about whether the defendant committed theft, but, if it finds he did, it will also make an explicit finding about the value of the property stolen. After hearing evidence relevant to sentencing, the jury will, as in the past, be instructed on the sentencing range, and it will return a sentence within that range. This procedure was thought preferable to the alternative of having the jury make a finding of guilt of theft in stage one and then, after hearing evidence on sentencing, make findings about the value of the property taken and sentence in stage two. The latter procedure might require trifurcation of trials in which there is a question about whether a defendant charged as a habitual offender committed felony or misdemeanor theft, unless one were willing to permit the jury to learn of the defendant's criminal record in the same stage in which it decides whether he committed felony, rather than misdemeanor, theft.

As has always been the case, familiarity with this book is essential to its effective use. This requires an understanding of the Criminal Code, a study of the arrangement and component parts of this book as shown in the table of contents, and attention to the Notes on Use and Comments that accompany each instruction.

The instructions in AMCI 2d consist of those which arise most frequently in criminal cases. After a reasonable amount of study to become familiar with the book's contents, a lawyer or judge should be able to find within this volume a complete set of instructions for most criminal trials, without the necessity of any drafting except for the insertion of names where appropriate. In some cases minor modifications of an AMCI 2d instruction must be made, changing of gender being a common example, or alternative language in the instruction must be selected.

The instructions to be used in a criminal case normally fall into nine categories:

1. Introductory instructions covering such matters as the duties of the judge and jury, the credibility of witnesses, burden of proof, presumption of innocence, and reasonable doubt. (AMCI 2d, Chapter 1.)
2. Evidentiary instructions. (AMCI 2d, Chapter 2.)
3. Preliminary explanation of lesser included offenses. (AMCI 2d, Chapter 3.)
4. Accomplices, including a definition of accomplices and the requirement that their

testimony be corroborated. (AMCI 2d, Chapter 4.)

5. Criminal attempts, solicitations, and conspiracies. (AMCI 2d, Chapter 5.)
6. Defenses and justification. (AMCI 2d, Chapters 6 and 7.)
7. An explanation of the particular offense on trial and its lesser included offenses. (AMCI 2d, Chapters 10 through 74.)
8. Stage one closing, special explanatory instructions (in some cases), and verdict forms. (AMCI 2d, Chapters 81 through 83.)
9. Stage two punishment instructions and verdict forms. (AMCI 2d, Chapters 91 through 94.)

The arrangement of the chapters and of the instructions in the book is intended to be a guide to the order in which the instructions should be given to the jury. This arrangement is, of course, optional with the trial judge. Sets of illustrative instructions, with accompanying statements of the facts, will be found in Chapter 95.

The chapters and instructions are not always numbered consecutively, because, for convenience, they are keyed to the chapter numbering of the Criminal Code, the first two numbers of the AMCI 2d instruction being the chapter of the Code containing the statute. For instance, theft offenses are defined at Ark. Code § 5-36-101 et seq., so AMCI 2d 3601 et seq. are theft instructions.

Whenever an alternative word, phrase, or clause is indicated, the alternatives are shown either in brackets or in parentheses. Brackets and parentheses are also used to show matter that may in some instances be omitted altogether. As between brackets and parentheses, the first alternative matter is always placed in brackets, an alternative within that alternative in parentheses, still a third interior alternative in brackets, and so on. Blanks are to be filled in as indicated, except that at times it may be found best to refer to "the defendants(s)" rather than to repeat the same name or names again and again.

There is no need to instruct on issues that are admitted, stipulated, or not in dispute. Thus, language in an instruction on such issues should be omitted regardless of whether it appears in a bracket or parentheses.

If AMCI 2d does not contain an applicable instruction, it will be necessary to modify an AMCI 2d instruction, if possible, or to prepare an instruction to cover the specific situation. In either event the following Per Curiam order of the Supreme Court of Arkansas, handed down on January 29, 1979, must be observed:

> If Arkansas Model Criminal Instructions (AMCI) contains an instruction applicable in a criminal case, and the trial judge determines that the jury should be instructed on the subject, the AMCI instruction shall be used unless the trial judge finds that it does not accurately state the law. In that event he will state his reasons for refusing the AMCI instruction. Whenever AMCI does not contain an instruction on a subject upon which the trial judge determines that the jury should be instructed, or when an AMCI instruction cannot be modified to submit the issue, the instruction on that subject should be simple, brief, impartial, and free from argument.

As a matter of convenience to the trial judge and to counsel it is suggested that each instruction submitted verbatim from AMCI 2d be identified by its AMCI 2d number. If a lawyer modifies an AMCI 2d instruction, the draft should contain the notation, "AMCI 2d—Modified."

CHAPTER 1

INTRODUCTORY INSTRUCTIONS

SYNOPSIS

100-A. Cautionary Instruction—Commencement of Trial

100-B. Instruction At The Beginning Of A Recess Or An Adjournment

101. Respective Duties Of Judge And Jury—Cautionary Instructions

102. Two Or More Defendants Being Tried Jointly

103. Jury—Personal Observations And Experiences

104. Credibility Of Witnesses

105. Expert Witness

106. Circumstantial Evidence

107. Burden Of Proof

108. Filing Of Indictment or Information Not To Be Considered As Evidence

109. Presumption Of Innocence

110. Reasonable Doubt

111. Right Of The Defendant Not To Testify

112-A. Instruction to Alternate Jurors—Before Trial

112-B. Instruction to Alternate Jurors—Before Deliberations

112-C. Substitution of Alternate Juror

113. Definitions—Knowingly-Purposely

114. Interpreters

115. Certified Facility Dog

(Text continued on page 1-3)

AMCI 2d 100-A
CAUTIONARY INSTRUCTION — COMMENCEMENT OF TRIAL

To ensure fairness, and the appearance of fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it. If someone should try to talk to you about the case, please report it to me.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case — you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the case sees you talking to a person from the other side — even if it is simply to pass the time of day — an unwarranted and unnecessary suspicion about your fairness might be aroused. When the lawyers, parties or witnesses do not speak to you when you pass in the hall or meet anywhere, remember it is because they are not supposed to talk or visit with you either.

Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. [In fact, until the trial is over, I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case, you will know more about the matter than anyone will learn through the news media.]

Sixth, do not do any research on the Internet or otherwise; or make any investigation about the case or the parties on your own. [Since this case involved an incident that occurred at a particular location, you may be tempted to visit the scene yourself. Please do not do so. This case must be tried solely upon the evidence presented to you in court and not upon any information or impression, whether correct or not, which you might acquire from visiting the scene. Even if you have previous information concerning the scene of the occurrence, due to your familiarity with it, you should keep that information to yourself and not allow it to become a part of the deliberation.]

Seventh, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

Eighth,

[if you have a cell phone, pager, or other communication device, you must turn that device off while in the courtroom. Unless instructed otherwise, you can use those devices only during recesses. You will be given a telephone number at which you can be contacted during the trial in case of an emergency].

[OR]

[do not bring cell phones, pagers, or other communication devices to the courtroom. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you. If you need to contact someone, the court will make a telephone available to you].

NOTE ON USE

This instruction should be given immediately following the empanelling of the jury, and is patterned after AMI Civil 101 of the Model Civil Instructions (2009).

There are two options for the "Eighth" paragraph. The first bracketed option is used unless the judge bans communication devices from the courtroom in which case the second bracketed option is used.

AMCI 2d 100-B
INSTRUCTION AT THE BEGINNING OF A RECESS OR AN ADJOURNMENT

During any recess or adjournment you must not discuss this case among yourselves or with anyone else and you must not permit anyone to discuss the case with you or in your presence. Do not email, blog, tweet, text, or post information about this case on social networking sites during this trial. If anyone attempts to discuss the case with you or in your presence get his name and report him to me immediately.

Furthermore, during any recess or adjournment you must not talk to any of the attorneys, parties, or witnesses about anything. You should not even pass the time of day with them in the courthouse or elsewhere. I say this, not because I think you would discuss this case with them, but simply because it is not proper for you to be seen talking with one side or the other. In other words, it is important that you be, and appear to be, impartial at all times during the trial of this case.

Do not do any research on the internet or otherwise; or make any investigation about the case or the parties on your own.

A. [During any recess or adjournment you must not read any newspaper account of this trial, and you must not listen to any radio report or watch any T.V. report regarding this case. Do not let anyone discuss any such account or report with you.]

B. [If you have a cell phone, pager, or other communication device, you must turn that device off while in the courtroom. Unless otherwise instructed, you can use those devices only during recesses. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you.]

[Or]

[Do not bring cell phones, pagers, or other communication devices to the courtroom. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you. If you need to contact someone, the court will make a telephone available to you.]

C. [I again remind you not to discuss this case, or talk at all with any attorneys, parties, or witnesses in this case.]

NOTE ON USE

This instruction should be given before the first recess. Thereafter, bracketed paragraph "C" may be given instead of the entire instruction.

Bracketed paragraph "A" should be given before each lunch break and evening recess if there is a possibility that the case will attract media coverage.

Bracketed paragraph "B" has two options depending upon whether the judge permits communication devices in the courtroom.

AMCI 2d 101
RESPECTIVE DUTIES OF JUDGE AND JURY—CAUTIONARY INSTRUCTIONS

(a) The faithful performance of your duties as jurors is essential to the administration of justice.

(b) It is my duty as judge to inform you of the law applicable to this case by instructions, and it is your duty to accept and follow them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of law with which you may be familiar unless it is included in my instructions.

(c) It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law. Do not do any research on the internet or otherwise; or any investigation about the case or the parties on your own. You should not permit sympathy, prejudice, or like or dislike of any party to this action or of any attorney to influence your findings in this case.

(d) Many of us have biases about, or certain perceptions, or stereotypes of other people. We may be aware of some of our biases, but not fully aware of others. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party, witness, or attorney because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socio-economic status.

(e) In deciding the issues you should consider the testimony of the witnesses and the exhibits received in evidence. The introduction of evidence in court is governed by law. You should accept without question my rulings as to the admissibility or rejection of evidence, drawing no inferences that by these rulings I have in any manner indicated my views on the merits of the case.

(f) Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any argument, statements, or remarks of attorneys having no basis in the evidence should be disregarded by you.

(g) I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything that I have done or said has seemed to so indicate, you will disregard it.

(h) You cannot use cell phones and other communication devices for any purpose when in the jury room during deliberations.

NOTE ON USE

This instruction is taken from AMI Civil 3d, 101. The court has held that it is the better practice to give this instruction when requested or to recite into the record the reasons for not giving it in the exceptional cases when a refusal to give

it is justified. *Smith v. Alexander*, 245 Ark. 567, 433 S.W.2d 157 (1968); *McDaniel Bros. Constr. Co. v. Mid-State Constr. Co.*, 252 Ark. 1223, 482 S.W.2d 825 (1972).

(Text continued on page 1-9)

AMCI 2d 102
TWO OR MORE DEFENDANTS BEING TRIED JOINTLY

Although _____ *(defendants)* are being tried jointly, you shall consider the evidence for or against each of them separately and render your verdicts as if each were being tried separately.

AMCI 2d 103
JURY — PERSONAL OBSERVATIONS AND EXPERIENCES

In considering the evidence in this case you are not required to set aside your common knowledge, but you have a right to consider all the evidence in the light of your own observations and experiences in the affairs of life.

COMMENT

This instruction is copied from AMI Civil 3d, 102. *Rogers v. Stillman*, 223 Ark. 779, 268 S.W.2d 614 (1954); *Kroger Grocery & Baking Co. v. Woods*, 205 Ark. 131, 167 S.W.2d 869 (1943); *Graysonia-Nashville Lumber Co. v. Carroll*, 102 Ark. 460, 144 S.W. 519 (1912).

AMCI 2d 104
CREDIBILITY OF WITNESSES

You are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given his testimony, you may take into consideration his demeanor while on the witness stand, any prejudice for or against a party, his means of acquiring knowledge concerning any matter to which he testified, any interest he may have in the outcome of the case, the consistency or inconsistency of his testimony, its reasonableness or unreasonableness, and any other fact or circumstance tending to shed light upon the truth or falsity of his testimony.

COMMENT

This instruction is taken from AMI Civil 3d, 103. *See Missouri Pac. Transp. Co. v. Sharp*, 194 Ark. 405, 108 S.W.2d 579 (1937); *Texas & Pac. Ry. v. Stephens*, 192 Ark. 115, 90 S.W.2d 978 (1936); *Missouri Pac. R.R. v. Montgomery*, 186 Ark. 537, 55 S.W.2d 68.

Even though the defendant's proffered instruction directing the jury to make an independent determination of the credibility of defendant's confession correctly stated the law, the trial court was correct in giving AMCI 104, which covers the weight and credibility to be given to a defendant's confession. *Clark v. State*, 374 Ark 292 (2008).

AMCI 2d 105
EXPERT WITNESS

An expert witness is a person who has special knowledge, skill, experience, training, or education on the subject to which his testimony relates.

An expert witness may give his opinion on questions in controversy. You may consider his opinion in the light of his qualifications and credibility, the reasons given for his opinion, and the facts and other matters upon which his opinion is based.

You are not bound to accept an expert opinion as conclusive, but should give it whatever weight you think it should have. You may disregard any opinion testimony if you find it to be unreasonable.

COMMENT

Ark. R. Evid. 702–705.

The trial court did not abuse its discretion in excluding expert testimony on cross-racial identification and was not required to give an instruction on the issue of cross-racial identification. *Lenoir v. State,* 77 Ark. App. 250, 72 S.W.3d 899 (2002).

The trial court did not abuse its discretion in giving the expert witness instruction where the testimony of law enforcement officers was admissible as expert testimony. *Weisenfels v. State*, 102 Ark. App. 191 (2008).

(Text continued on page 1-15)

AMCI 2d 106

CIRCUMSTANTIAL EVIDENCE

A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case. However, circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion.

NOTE ON USE

This instruction should be used only in a case involving circumstantial evidence.

COMMENT

See Laird v. State, 251 Ark. 1074, 476 S.W.2d 811 (1972).

For a lengthy discussion of a capital murder conviction based on circumstantial evidence, *see Gregory v. State,* 341 Ark. 243, 15 S.W.3d 690 (2000).

AMCI 2d 107

BURDEN OF PROOF

The State must prove beyond a reasonable doubt each element of the offense charged. On the other hand, the defendant(s) [is] [are] **not required to prove** [his] [their] **innocence.**

AMCI 2d 108

FILING OF INDICTMENT OR INFORMATION NOT TO BE CONSIDERED AS EVIDENCE

The filing of an [indictment] [information] **is merely the means by which a person is brought to trial. It is not evidence and is not to be considered by you in determining the guilt or innocence of** _____ *(defendant(s)).*

NOTE ON USE

This instruction should be given only when the indictment or information is read to the jury.

AMCI 2d 109

PRESUMPTION OF INNOCENCE

There is a presumption of the defendant's innocence in a criminal prosecution. In this case _____ *(defendant(s))* [is] [are] presumed to be innocent. That presumption of innocence attends and protects [him] [them] throughout the trial and should continue and prevail in your minds until you are convinced of [his] [their] guilt beyond a reasonable doubt.

NOTE ON USE

This instruction shall be given in every case. Its use eliminates the need for an instruction stating that the indictment or information is not evidence of guilt and raises no presumption of guilt. *Williams v. State*, 184 Ark. 622, 43 S.W.2d 731 (1931); *Deshazo v. State*, 120 Ark. 494, 179 S.W. 1012 (1915). If, however, the court reads the indictment or information, AMCI 2d 108 shall also be given.

COMMENT

This instruction is derived from *Black v. State*, 171 Ark. 307, 284 S.W. 751 (1926); *Deshazo v. State,* 120 Ark. 494, 179 S.W. 1012 (1915); and *Paxton v. State*, 108 Ark. 396, 157 S.W. 396 (1913).

AMCI 2d 110
REASONABLE DOUBT

Reasonable doubt is not a mere possible or imaginary doubt. It is a doubt that arises from your consideration of the evidence and one that would cause a careful person to pause and hesitate in the graver transactions of life. A juror is satisfied beyond a reasonable doubt if after an impartial consideration of all the evidence he has an abiding conviction of the truth of the charge.

NOTE ON USE

This instruction shall be given in every case.

COMMENT

This definition, with some modifications, is taken from *Laird v. State*, 251 Ark. 1074, 476 S.W.2d 811 (1972).

This instruction, taken as whole, correctly conveys the concept of reasonable doubt to the jury. *Clark v. State*, 374 Ark 292 (2008).

AMCI 2d 111
RIGHT OF THE DEFENDANT NOT TO TESTIFY

A defendant has an absolute constitutional right not to testify. The fact that _____ *(non-testifying defendant(s))* did not testify is not evidence of guilt or innocence and under no circumstances shall be considered by you in arriving at your verdict.

NOTE ON USE

This instruction should be given only when it is requested by the defendant. It is reversible error for the court to give it over the defendant's objection, *Russell v. State*, 240 Ark. 97, 398 S.W.2d 213 (1966), or even to refer to the defendant's right to testify or not to testify, as during the impaneling of the jury. *Mosby v. State*, 249 Ark. 17, 457 S.W.2d 836 (1970).

AMCI 2d 112-A
INSTRUCTION TO ALTERNATE JURORS — BEFORE TRIAL

As alternate jurors, you are bound by the same rules that govern the conduct of the jurors who are sitting on the panel. You will observe the same trial and should pay attention to all of my instructions just as if you were sitting on the panel. Sometimes a juror needs to be excused during a trial for illness or some other reason. If that happens, an alternate may be selected to take that juror's place.

[*(Judge may inform the alternate jurors of arrangements during their service in the courthouse.)*]

NOTE ON USE

If an alternate juror is not dismissed when deliberations begin, give AMCI 2d 112-B.

If an alternate juror is substituted, give AMCI 2d 112-C, Substitution of Alternate Juror.

Use the bracketed second paragraph if there is information that the judge should give to the alternate jurors regarding logistics of their service.

COMMENT

Rule 32.3, Rules of Criminal Procedure.

AMCI 2d 112-B
INSTRUCTION TO ALTERNATE JURORS — BEFORE DELIBERATIONS

The jury is retiring to consider its verdict. Your service as an alternate juror is not yet over. You have heard my instructions. While you remain an alternate juror, do not discuss the case with anyone, including other alternate jurors. You are not allowed to go into the jury room during deliberations, but you are to remain at the courthouse during deliberations until I release you.

[*(Judge may inform the alternate jurors of arrangements during their service in the courthouse.)*]

NOTE ON USE

If an alternate juror is not dismissed when deliberations begin, give this instruction.

If an alternate juror is substituted, give AMCI 2d 112-C, Substitution of Alternate Juror.

Use the bracketed second paragraph if there is information that the judge should give to the alternate jurors regarding logistics of their service during deliberations.

COMMENT

Rule 32.3, Rules of Criminal Procedure.

AMCI 2d 112-C
SUBSTITUTION OF ALTERNATE JUROR

One of the jurors has been excused, and an alternate juror has been selected to take [his/her] place. [Since deliberation on the (jury's verdict) (jury's sentence) has begun, the alternate juror must be given the opportunity to participate fully in your deliberations. Therefore, you must set aside and disregard all previous deliberations and begin your deliberations all over again.]

NOTE ON USE

Use this instruction when an alternate juror is selected. If the substitution occurs after deliberations have begun, use the bracketed language and insert the parenthetical depending on whether it occurs during the guilt or penalty phase.

COMMENT

Rule 32.3, Rules of Criminal Procedure.

AMCI 2d 113
DEFINITIONS—KNOWINGLY-PURPOSELY

Committee's Note: *The committee has refined the definitions of "knowingly" and "purposely" in an attempt to make them more "juror friendly" and understandable. The definitions of these terms that appear throughout the instructions are based on their definitions that appear in Ark. Code Ann. § 5-2-202. The committee believes the revisions that appear below are consistent with the statutory language. It is discretionary with the parties and ultimately the judge as to which definitions to use.*

If the court decides to use this alternative language, then the definition(s) that appear below should be substituted for the one that appears in the body of the various instructions in the book. The committee has not attempted to revise every instruction in which the definitions appear.

"Knowingly."—

A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.

A person acts knowingly with respect to the circumstances that exist at the time of his act when he is aware that the circumstances exist.

A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purposely."—

A person acts purposely with respect to the results of his conduct when it is his conscious object *[or intention]* to cause the results.

NOTE ON USE

These definitions may be substituted for the ones that appear in the text of the instructions. See committee's note above.

COMMENT

Ark. Code Ann. § 5-2-202.

AMCI 2d 114
INTERPRETERS

Languages other than English [will be used] [have been used] during this trial. The evidence you are to consider is only that provided through the official court interpreters. Although some of you may understand the non-English language used, it is important for all jurors to consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must not rely in any way upon your own interpretation of the witness' words.

NOTE ON USE

This instruction should be given before the foreign language witness testifies or at the beginning of the trial and before the jury begins its deliberations.

COMMENT

This instruction is drawn from materials prepared by the National Center for State Courts. WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 152 (1995), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/162.

(Rcl. 10-3/2016 Pub.60190)

AMCI 2d 115
CERTIFIED FACILITY DOG

A certified facility dog is used in the courtroom to reduce anxiety that may be experienced by the child while testifying. The jury should not draw any conclusions about the witness's credibility based on the dog's presence. The presence of the dog should not give rise to sympathy or prejudice toward any party or witness.

NOTE ON USE

This instruction may be used when a certified facility dog accompanies a child witness.

COMMENT

Act 957 of 2015; Ark. Code Ann. § 16-43-1002(f).

CHAPTER 2

EVIDENTIARY INSTRUCTIONS

SYNOPSIS

200. Evidentiary Instructions

201. Acts and Statements of Co-Conspirators

202. Prior Inconsistent Statements by a Witness Other Than the Accused

203. Previous Conviction — Impeachment

203-A. Rule 404(B) Evidentiary Instruction

204. Defendant's Character

205. Statutory Presumption

206. Corroboration of Confession

AMCI 2d 200
EVIDENTIARY INSTRUCTIONS

COMMENT

Instructions characterized as "evidentiary" have frequently been given by trial courts in Arkansas. For example, instructions can be found on the following: "Flight from the scene of a crime," "dying declarations," "concealment or destruction of evidence," "corpus delicti," and "confessions and admissions."

Under Ark. R. Evid. 104, it is clear that the judge, not the jury, makes the determination of admissibility of evidence; therefore, most evidentiary instructions will no longer be appropriate. In other words, once the judge makes the determination that evidence is admissible, it will be a matter of argument of counsel as to the weight to be given that evidence.

There are a few areas where evidentiary instructions may be appropriate. The instructions that follow cover these areas.

AMCI 2d 201
ACTS AND STATEMENTS OF CO-CONSPIRATORS

Before you may consider any statements made or acts done by any person as evidence against another person, you must first find beyond a reasonable doubt from all the other evidence in the case that a conspiracy existed. If you do so find, then statements made and acts done by any person found to be a member of that conspiracy may be considered by you as evidence in the case as to all other members, even though the statements and acts occurred in the absence and without the knowledge of the other member(s), provided that such statements were made and such acts were done during the existence of the conspiracy and in the furtherance of some purpose of the conspiracy.

If you do not [ultimately] find beyond a reasonable doubt that a conspiracy existed, any statement made or any act done by one person may not be considered as evidence against any person who was not present when the statement was made or when the act was done.

In other words, before you can hold a defendant accountable for the statements or acts of any other person or persons, you must find beyond a reasonable doubt:

First, that a conspiracy existed and that he and the person making the statement or doing the act were members of the conspiracy;

Second, that the statement was made or the act was done during the life of the conspiracy; and

Third, that the statement made or act done was in furtherance of some purpose of the conspiracy.

NOTE ON USE

The bracketed word "ultimately" should be used if the trial court gives this instruction during the course of the trial when a statement or act of a purported co-conspirator is admitted into evidence, subject to being "connected up" by later independent proof of the conspiracy.

This instruction should be given at the time the evidence is admitted if requested by a defendant against whom it may be used. After the full instruction has been given during the course of the trial, an abbreviated form may be preferable for subsequent statements or acts admitted conditionally. The full instruction should be given, on request, during the final instructions.

COMMENT

Ark. R. Evid. 104 provides that the court may admit evidence conditionally "[w]henever the relevancy of evidence depends upon the fulfillment of a condition of fact." Ark. R. Evid. 105 provides that the trial court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. It is a better practice to give this limiting instruction as the evidence is received. 1 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE, § 105(05), p. 105-34 (1976).

"The existence of a conspiracy in fact is sufficient to support admissibility, and a conspiracy count in the indictment is not required. The evidence is similarly admissible in civil cases, where the conspiracy rule applies to tortfeasors acting in concert." McCormick, Evidence, § 267 (Cleary ed. 1972).

Generally, the courts have held that statements made before a defendant joined the conspiracy are admissible against him, but that statements made after he has withdrawn are not admissible. 4 Weinstein & Berger, Weinstein's Evidence, § 801(d)(2)(E)(01), pp. 801-153 (1976).

This instruction is not unconstitutional on its face as violative of due process. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993).

AMCI 2d 202
PRIOR INCONSISTENT STATEMENTS BY A WITNESS OTHER THAN THE ACCUSED

Evidence that a witness previously made a statement which is inconsistent with his testimony at the trial may be considered by you for the purpose of judging the credibility of the witness but may not be considered by you as evidence of the truth of the matter set forth in that statement.

NOTE ON USE

This instruction should be given at the time the prior inconsistent statement is admitted into evidence, if requested by the defendant.

This instruction should not be used when the prior inconsistent statement was given under oath and subject to the penalty of perjury at a prior trial, hearing, or other proceeding, because such statements are not hearsay and may be admitted to prove the truth of the contents of the statement.

COMMENT

Ark. R. Evid. 105 and 801(d)(1). This instruction was approved as an accurate statement of the law in *Jones v. State*, 318 Ark. 704, 725–26 (1994).

Chisum v. State, 273 Ark. 1, 616 S.W. 2d 728 (1981); *Davis v. State*, 375 Ark. 368 (2009) (not giving instruction upheld on appeal).

AMCI 2d 203
PREVIOUS CONVICTION — IMPEACHMENT

Evidence that a witness has previously been convicted of [a crime] [crimes] **may be considered by you for the purpose of judging the credibility of the witness** [but not as evidence of guilt of the defendant].

NOTE ON USE

This instruction should be given at the time evidence of a prior conviction is admitted into evidence, if requested.

This instruction should not be used if the previous conviction is admitted into evidence for some purpose such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

COMMENT

Ark. R. Evid. 105, 404, and 609.

AMCI 2d 203-A
RULE 404(B) EVIDENTIARY INSTRUCTION

Members of the jury, you are instructed that evidence of other alleged crimes, wrongs or acts of _____ (defendant) may not be considered by you to prove the character of_____(defendant) in order to show that he acted in conformity therewith. This evidence is not to be considered to establish a particular trait of character that he may have, nor is it to be considered to show that he acted similarly or accordingly on the day of the incident. This evidence is merely offered as evidence of [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [absence of mistake or accident] [_____ **(specify other)**]. **Whether any other alleged crimes, wrongs, or acts have been committed is for you to determine.**

NOTE ON USE

This instruction should be given when evidence of other crimes, wrongs or acts is admitted into evidence. When requested, this instruction should be given as a cautionary instruction at the time the evidence is introduced. Although this instruction applies primarily to situations when prior bad act evidence is introduced against the defendant, it may also apply to situations where evidence of the prior bad acts of a victim is introduced. *Kagebein v. State*, 254 Ark. 904, 496 S.W.2d 435 (1973). *See generally Pyle v. State*, 314 Ark. 165, 862 S.W. 2d 823 (1993); *McCullough v. State*, 2009 Ark 134.

COMMENT

See Wallace v. State, 2018 Ark. App. 451 (A modified AMCI 2d 203-A was given dealing with consciousness of guilt and contemplation of suicide).

AMCI 2d 204
DEFENDANT'S CHARACTER

If you find that the defendant is a person of good character you may take that fact into consideration in determining his guilt or innocence, but if you believe from all the evidence in the case beyond a reasonable doubt that the defendant is guilty you should so find, notwithstanding his good character.

NOTE ON USE

This instruction should be given only where the defendant's character has been placed in issue.

COMMENT

White v. State, 164 Ark. 517, 262 S.W. 338 (1924). *See* Ark. R. Evid. 404.

AMCI 2d 205
STATUTORY PRESUMPTION

Evidence of_____ (basic fact) **may be considered by you, along with all the other evidence in the case, in determining**_____**(presumed fact), but that evidence alone does not impose upon you the duty of finding**_____**(presumed fact)** [even if the evidence is unrebutted].

NOTE ON USE

This instruction should be used when the evidence raises a statutory presumption other than the shoplifting presumption (AMCI 2d 3602-PR), the presumption of intent to defraud from absconding without payment under certain circumstances (AMCI 2d 3603), the presumption from unexplained possession of recently stolen property (AMCI 2d 3605), the presumption of possession to manufacture methamphetamine (AMCI 2d 6416–PR, and the presumption from possession of a specified quantity of a controlled substance (AMCI 2d 6407). Use the bracketed phrase only if requested by the defendant.

COMMENT

Ark. Code Ann. § 5-1-111(e)(2). This instruction does not constitute a comment on the evidence by the judge. *Thiel v. Dove*, 229 Ark. 601, 317 S.W.2d 121 (1958). It is improper for the judge to tell the jury that a specific fact in evidence is sufficient to support a specified inference or presumption of fact. *French v. State*, 256 Ark. 298, 506 S.W.2d 820 (1974). *See* Ark. R. Evid. 303(b). If the legislature hereafter enacts new statutory presumptions, the court should use this instruction.

Failure to use this instruction where applicable is reversible error. *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983).

AMCI 2d 206
CORROBORATION OF CONFESSION

A confession of a defendant [unless made in open court] will not warrant a conviction unless [accompanied with other proof that the offense was committed] [or] [supported by substantial independent evidence establishing the trustworthiness of the confession].

NOTE ON USE

This instruction should be given when requested by the defendant. The phrase contained in the brackets should not be used unless the confession was made in open court.

COMMENT

Ark. Code Ann. § 16-89-111(d); *Leshe v. State*, 304 Ark. 442, 803 S.W.2d 522 (1991); *Davis v. State*, 115 Ark. 566, 173 S.W. 829 (1914).

CHAPTER 3

LESSER INCLUDED OFFENSES

SYNOPSIS

301. Lesser Included Offenses: Introductory Instruction
302. Lesser Included Offenses: Transitional Instruction

AMCI 2d 301
LESSER INCLUDED OFFENSES: INTRODUCTORY INSTRUCTION

_____ *(Defendant(s))* [is] [are] **charged with _____ (offense). This charge includes the lesser offenses of _____ (lesser offenses in order of highest classification).**

You may find [the] [a] **defendant guilty of one of these offenses or you may acquit him outright.**

[You should consider the guilt or innocence of each defendant separately. You do not have to reach the same verdict with regard to each defendant. For example, you may find one defendant guilty of some offense and another not guilty of any offense; or, you may find one defendant guilty of the offense charged and another guilty of (a) (the) lesser included offense; or, you may find each defendant guilty of (a) (the) (different) lesser included offense; or, you may acquit each defendant outright.]

If you have a reasonable doubt of the guilt of [a] [the] **defendant on the greater offense, you may find him guilty only of the lesser offense. If you have a reasonable doubt as to** [a] [the] **defendant's guilt of** [all] [both] **offenses, you must find him not guilty.**

[If you have a reasonable doubt of the guilt of [a] [the] defendant on the greater offense, you may find him guilty only of the lesser offense. If you find that (defendant) committed the offense of murder, you will then consider the offense of manslaughter. **If you have a reasonable doubt as to** [a] [the] **defendant's guilt of** [all] [both] **offenses, you must find him not guilty**.]

NOTE ON USE

The jury should be instructed on lesser included offenses if there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of a lesser included offense.

The first, second, and fourth paragraphs should all be given as a single introductory instruction before the definition of any offense, as should the third paragraph if the jury is to be instructed on lesser included offenses with regard to more than one defendant.

This instruction assumes that when there are two or more defendants they are all charged with the same offense. If this is not the case the instruction should be appropriately modified. *See* AMCI 2d 9501 *et seq.* (Illustrative Instructions).

Use last bracketed option when extreme emotional disturbance manslaughter is being submitted to the jury.

COMMENT

Prior to the adoption of the Criminal Code (Act 280 of 1975), the supreme court employed a judicially created three-prong test to determine when an offense was a lesser included offense. An accused could be convicted of a lesser offense than

that charged when (1) both offenses belonged to the same generic class, (2) the commission of the higher offense involved the commission of the lower, and (3) the charge of the higher offense contained all the substantive allegations necessary to let in proof of the lesser offense. To be considered a lesser included offense, all three prongs of the judicially created test must be satisfied. *See Caton v. State,* 252 Ark. 420, 479 S.W.2d 537 (1972), reaffirming the test as originally announced in *Cameron v. State,* 13 Ark. 712 (1852).

Section 105(b) of Act 280 of 1975, which is codified as Ark. Code Ann. § 5-1-110(b), adopted a different definition of lesser included offense:

(b) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:

(1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or

(2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or

(3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

The statutory test of lesser included offense requires that only one of the three alternative tests be met.

For ten years following the adoption of the Criminal Code the supreme court used the statutory test of lesser included offense set out in § 5-1-110(b). In 1985, without explanation, the court reverted to the judicially created pre-code test of lesser included offense. *See Thompson v. State,* 284 Ark. 403, 682 S.W.2d 742 (1985). Until *McCoy v. State,* 347 Ark. 913, 69 S.W.3d 430 (2002), the court continued to use the judicial test. *See Hill v. State,* 344 Ark. 216, 40 S.W.3d 751; *Goodwin v. State,* 342 Ark. 161, 27 S.W.3d 397; *Byrd v. State,* 337 Ark. 413, 992 S.W.2d 759 (1999); *McElhanon v. State,* 329 Ark. 261, 948 S.W.2d 89 (1997); *Brown v. State,* 325 Ark. 504, 929 S.W.2d 146 (1996); *Tackett v. State,* 298 Ark. 20, 766 S.W.2d 410 (1989); *Henderson v. State,* 286 Ark. 4, 688 S.W.2d 734 (1985). In *McCoy* the court conceded that the lesser included formulation used in *Thompson* and its progeny was incorrect and announced that henceforth an offense must meet the statutory test of § 5-1-110(b) to be considered a lesser included offense.

[Many of the cited cases were decided prior to *McCoy v. State.* See introductory discussion above.]

The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. Ark. Code Ann. § 5-1-110 (c).

For some time the general rule has been as follows:

"It is error to refuse to give a requested instruction defining a lesser included

offense when there is testimony on which the defendant might be found guilty of the lesser, rather than the great, offense . . . . But it is not error to refuse such an instruction when the evidence clearly shows that the defendant is either guilty of the greater charge or innocent." *Parker v. State*, 258 Ark. 880, 885, 529 S.W.2d 860, 863 (1975). *See also Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993) and *Caton v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972).

If an offense is a lesser-included offense, the court is obligated to instruct the jury on that offense only if there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser included offense. *Bruner v. State*, 2013 Ark. 68.

Where defendant argues that he committed no offense, there is no rational basis for the giving of lesser-included offenses. *Nickelson v. State*, 2012 Ark. App. 363; *Percefull v. State*, 2011 Ark. App. 378.

"The trial judge did not commit error in refusing to instruct on lesser included offenses when defendant claimed an alibi." *Brown v. State*, 321 Ark. 413 (1995). No rational basis exists to instruct the jury on lesser-included offenses when defendant claims innocence. *Flowers v. State*, 362 Ark. 193, 208 S.W. 3d 113 (2005). A trial judge may refuse to offer a jury instruction on an included offense when there is no rational basis for a verdict acquitting the defendant of the charged offense and convicting him of the included offense. *Atkinson v. State*, 347 Ark. 336, 64 S.W. 3d 259 (2002).

In *State v. Jones*, 321 Ark. 451 (1995), a prosecution for first degree murder, the State appealed, asking for a declaration that the trial judge had committed error when it refused to instruct on the lesser included offense of manslaughter. The Supreme Court held that the trial judge had erred. The record contained evidence providing a rational basis for a jury to find guilt of the lesser included offense. The Court said, "Error occurs where the trial court refuses to give the lesser included instruction where there is the slightest evidence to warrant it." *State v. Jones*, 321 Ark. 451, 455 (1995).

In appropriate cases an instruction on a lesser included offense should be given over the defendant's objection. *Glover v. State*, 273 Ark. 376, 619 S.W.2d 629 (1981); *State v. Jones*, 321 Ark. 451 (1995).

In *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999), the State charged the defendant with capital murder based on premeditation and deliberation but not with capital felony murder. The Supreme Court held that the defendant was not entitled to an instruction on first degree felony murder.

In *Kennedy v. State*, 338 Ark. 125, 991 S.W.2d 606 (1999), the defendant argued that robbery, as the underlying offense on which his capital felony murder charge was based, was a lesser-included offense. The issue was not properly preserved for appeal, but the Supreme Court denied a claim of ineffective assistance of counsel for failure to seek a robbery instruction because the trial court did give an instruction similar to AMCI 2d 1001-AD, thereby allowing the jury to acquit the defendant if it found he did not commit the homicidal act.

Byrd v. State, 337 Ark. 413, 992 S.W.2d 759 (1999), involved a first degree murder prosecution for knowingly causing the death of a person fourteen years of age or younger. The Supreme Court upheld the trial court's refusal to give instruction on second degree murder since knowingly causing the death of the victim "under circumstances manifesting extreme indifference to the value of human life" is not an element of the charge for first degree murder of a person aged fourteen years or younger.

The defendant in *Cobb v. State,* 340 Ark. 240, 12 S.W.3d 195 (2000), argued that he was acting in self-defense when he shot the victim. The Supreme Court upheld the trial court's determination that a manslaughter instruction proffered by the defendant was inconsistent with the defense of justification, particularly when the evidence showed that the defendant shot the victim a second time after the first shot had already paralyzed the victim.

The jury in *Fudge v. State,* 341 Ark. 759, 20 S.W.3d 315 (2000), was instructed on capital murder and first degree murder, but the trial court refused the defendant's proffered instruction on second degree murder. On appeal the Supreme Court held that the evidence plainly showed that the defendant was guilty of capital murder. It also upheld the application of the "skip rule"—i.e., "when a lesser-included offense has been given, and the jury convicts of the greater offense, any error resulting from the failure to give an instruction on another still lesser included offense is cured." *Fudge v. State,* 341 Ark. 759, 767, 20 S.W.3d 315 (2000)

In *Kail v. State,* 341 Ark. 89, 14 S.W.3d 878 (2000), the jury convicted the defendant of murder in the first-degree for shooting his father-in-law. The trial court did not allow the defendant to present evidence concerning marital discord with the victim's daughter, through which the defendant hoped to show emotional disturbance. The trial court also refused to give an instruction on the lesser-included offense of manslaughter. The Supreme Court ruled that frustration, anger, and resentment, standing alone, did not constitute evidence of extreme emotional distress on which a manslaughter instruction could be based.

The defendants in *Nichols v. State,* 69 Ark. App. 212, 11 S.W.3d 19 (2000), were convicted of kidnapping, aggravated robbery, and theft of property. One defendant asserted on appeal that the court should have instructed the jury on false imprisonment and robbery, which are lesser-included offenses. The Supreme Court held that because the defendant asserted he was innocent of all charges, there was no rational basis for giving instructions on the lesser included offenses. The jury could only determine whether the defendant was guilty as charged.

In *Goodwin v. State,* 342 Ark. 161, 27 S.W.3d 397 (2000), the Supreme Court held that possession of a controlled substance is a lesser-included offense of furnishing a prohibited article, so the trial court did not err in giving both instructions.

On appeal of his conviction of manufacturing methamphetamine, the defendant in *Chapman v. State,* 343 Ark. 643, 38 S.W.3d 305 (2001), argued that the trial

court should have given an instruction on the lesser included offense of possession. The Supreme Court ruled that "where a defendant claims that he is entirely innocent, no rational basis exists to instruct the jury on a lesser included offense because the jury need only determine whether defendant is guilty of the crime charged." *Chapman v. State,* 343 Ark. 643, 651, 38 S.W.3d 305 (2001); *Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005).

The defendant in *Britt v. State,* 344 Ark. 13, 38 S.W.3d 363 (2001), was convicted of first degree murder and appealed citing the trial court's failure to give instructions on the lesser-included offenses of second-degree murder and manslaughter. The Supreme Court noted that the defendant produced no evidence that he acted under extreme emotional disturbance or that he acted recklessly, nor was there any evidence that the defendant acted with a "knowing mental state rather than a purposeful mental state." *Britt v. State,* 344 Ark. 13, 23, 38 S.W.3d 363 (2001). For these reasons, the defendant was not entitled to instructions on the lesser-included offenses of second-degree murder and manslaughter. In order for a jury to be instructed on extreme-emotional-disturbance manslaughter, there must be evidence that the defendant killed the victim in the moment following some kind of provocation. *Jackson v. State*, 375 Ark. 321 (2009).

In *Harshaw v. State,* 344 Ark. 129, 39 S.W.3d 753 (2001), the trial court instructed the jury on second degree murder and self-defense but refused the defendant's proffered instruction on manslaughter. The Supreme Court held that there was evidence which supported a finding that the defendant recklessly or unreasonably formed a belief that he needed to use deadly force in his own defense. Although such a finding precluded acquittal on the basis of self-defense, it put the offense of manslaughter squarely in issue. Consequently, the trial court erred in not giving a manslaughter instruction to the jury.

In *Hill v. State,* 344 Ark. 216, 40 S.W.3d 751 (2001), the Supreme Court ruled that felony manslaughter was not a lesser-included offense of capital felony murder or first-degree felony murder. The Supreme Court determined that felony manslaughter includes the element of negligence, which is not an element of either degree of felony murder. Also, felony manslaughter neither embodies a less serious injury to the victim nor entails a lesser culpable mental state. Consequently, the proffered instruction on felony manslaughter failed to meet the criteria of a lesser-included offense. Felony manslaughter is not a lesser-included offense of felony murder. *Holman v. State*, 372 Ark. 2, 269 S.W.3d 815 (2007); *Perry v. State*, 371 Ark. 170, 264 S.W.3d 498 (2007).

The defendant in *Brown v. State,* 74 Ark. App. 281, 47 S.W.3d 314 (2001), was convicted of second degree battery and committing a terroristic act after he fired at least nine shots at a vehicle driven by his wife, hitting her twice. The court of appeals ruled the defendant could be convicted of both offenses despite his double jeopardy claims. The decision apparently hinged on the fact that the defendant fired multiple shots, only some of which struck the victim.

The defendant in *Cook v. State,* 350 Ark. 398, 86 S.W.3d 916 (2002), was charged as an accomplice to first degree murder and aggravated robbery. He

argued that he was entitled to an instruction on robbery because there was evidence he was unaware that his accomplice intended had and used a gun. Similarly, he argued that he was entitled to a felony manslaughter instruction because the jury could have found that he acted only negligently in causing the death of the victim. The court ruled that the defendant was criminally responsible for the acts of his accomplice. Whether the defendant knew that his accomplice planned to use a weapon or whether the defendant acted negligently with respect to the death of the victim were not relevant, and the instructions were appropriately refused.

A defendant charged with aggravated robbery was not entitled to an instruction on attempted aggravated robbery since evidence showed a completed course of conduct, and defendant was either guilty of aggravated robbery or innocent. *Alexander v. State,* 78 Ark. App. 56, 77 S.W.3d 544 (2002).

The trial court erred in *Kelly v. State,* 80 Ark. App. 126, 91 S.W.3d 526 (2002), when it failed to give a lesser included manslaughter instruction, but the error was harmless under the "skip rule" where the jury skipped second degree murder and convicted defendant of first degree murder. *See also Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006); *Yankaway v. State*, 366 Ark. 18, 233 S.W.3d 136 (2006); *Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005); *Rutledge v. State*, 361 Ark. 229, 205 S.W.3d 773 (2005).

The defendant in *Morris v. State,* 351 Ark. 426, 94 S.W.3d 913 (2003), testified that he shot into a vehicle because he thought a passenger in the rear seat was reaching for a gun. The defendant's shot killed the driver of the vehicle. The supreme court ruled that the trial court erred in refusing defendant's request for a second degree murder instruction because there was evidence supporting the conclusion that defendant acted with a knowing mental state rather than a purposeful mental state when he killed the victim. The supreme court agreed with the trial court, however, that a manslaughter instruction was not required. The defendant's subjective fear of being shot, in the absence of any evidence supporting the fear, did not show that he recklessly formed the belief that he was about to be shot.

Conduct violating Ark. Code Ann. § 5-27-303(b) [parent or legal guardian engaging children in sexually explicit conduct] is not a lesser included offense of Ark. Code Ann. § 5-27-403 [producing, directing or promoting a sexual performance]. *Cummings v. State,* 353 Ark. 618, 110 S.W.3d 272 (2003).

Trial court erred in failing to instruct jury on manslaughter and the "skip" rule did not apply even though defendant was convicted of first degree murder. The jury could have found that although the defendant purposely killed the victim, he did so under the influence of extreme emotional disturbance for which there was a reasonable excuse and thus could be found guilty only of manslaughter. *Whittier v. State*, 84 Ark. App. 362, 141 S.W.3d 924 (2004).

"Possession of pseudoephedrine with intent to manufacture methamphetamine is not a lesser included offense of possession of drug paraphernalia with intent to

manufacture methamphetamine." *Autrey v. State*, 90 Ark. App. 131, 204 S.W.3d 84 (2005).

"False imprisonment and false imprisonment in the second-degree are not lesser-included offenses of kidnapping." *Davis v. State*, 365 Ark. 634, 232 S.W.3d 476 (2006) WL650001.

Sexual assault (Ark. Code Ann. 5-14-125(a)(3)(A)-(B)) is not a lesser included offense of rape (Ark. Code Ann. 5-14-103(a)(3)(A)). *Joyner v. State*, 2009 Ark. 168.

This instruction was amended in 2013. The Supreme Court found that it was not appropriate for use in a case where there is evidence to support an instruction of extreme-emotional-disturbance manslaughter and greater offenses of murder because it places a jury in the impossible position of being instructed to not consider the offense of manslaughter unless it has reasonable doubt as to murder, but also instructs them to not find guilt on manslaughter unless the defendant has committed murder. *Fincham v. State*, 2013 Ark. 204.

Double jeopardy did not bar a retrial on charges of capital murder and the lesser included offense of first-degree murder, despite the oral report of the jury foreperson that the jury was unanimously opposed to convicting the defendant on those charges. The trial court was not required to issue partial verdict forms or instruct the jury on new options for a verdict in order to avoid a mistrial in the first trial. *Blueford v. Arkansas*, 132 S.Ct. 2044 (2012).

AMCI 2d 302
LESSER INCLUDED OFFENSES: TRANSITIONAL INSTRUCTION

If you have a reasonable doubt of the defendant's guilt on the charge of _____ *(charged offense or lesser included offense just considered)* **you will then consider the charge of** _____ *(next lesser included offense).*

[**If you have a reasonable doubt of the defendant's guilt on the charge of** _____ *(charged offense or lesser included offense just considered)* **you will then consider the charge of** _____ *(next lesser included offense)*. If you find that (defendant) committed the offense of murder, you will then consider the offense of manslaughter.]

NOTE ON USE

The first sentence of the instruction on each lesser included offense should be omitted. Whenever one or more lesser included offenses are submitted to the jury, this instruction is to be given at the end of each instruction defining an offense, except the last one.

Use last bracketed option when extreme emotional disturbance manslaughter is being submitted to the jury.

COMMENT

Instruction 302 is a correct statement of the law and is not ambiguous. *Nichols v. State*, 2015 Ark. 274, 465 S.W.3d 846. The Supreme Court stated in *Fincham v. State*, 2013 Ark. 204: "[T]he jury should have been instructed to consider manslaughter after it found Fincham guilty of murder." *Id.* at 8.

In *Kellon v. State*, 2018 Ark. 46, appellant sought to modify AMCI Crim. 2d 301 and 302 and to omit AMCI Crim. 2d 8103. He argued that because the elements of the crimes for which he was charged, capital felony murder and the lesser included crime of first-degree felony murder, are identical, requiring that the charges be considered sequentially is incompatible with the law. He further asserted that the jury could never convict on the lesser included first-degree charge because the jurors would first have to acquit the defendant of the greater capital charge on the exact same elements. The Supreme Court rejected appellant's arguments and explained that the court's precedent explicitly approves jury deliberations over multiple offenses with overlapping elements but divergent levels of severity. *Id.*

CHAPTER 4

ACCOMPLICES

SYNOPSIS

401. Accomplices—Definition and Joint Responsibility

401-D. Accomplices: Affirmative Defense

402. Accomplice Status Undisputed—Corroboration

403. Accomplice Status in Dispute—Corroboration

403.1-VF. Interrogatory—Accomplice Status In Dispute

404. Mere Presence

405. Accomplices—Culpability

AMCI 2d 401
ACCOMPLICES—DEFINITION AND JOINT RESPONSIBILITY

In this case the State does not contend that *(defendant(s))* [each] **acted alone in the commission of the offense(s) of** *(offense(s)* charged). **A person is criminally responsible for the conduct of another person when he is an accomplice in the commission of an offense.**

An accomplice is one [who directly participates in the commission of an offense or] **who, with the purpose of promoting or facilitating the commission of an offense:**

[Solicits, advises, encourages or coerces the other person to commit the offense;] [or]

[Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense;] [or]

[Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.]

[*insert definition of any legal duty asserted*]

Definition

"Purpose."—A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

If it is alleged that the defendant failed to discharge a legal duty, a definition or description of the legal duty needs to be provided to the jury.

When a defendant is being tried as an accomplice to a criminal offense committed by another, the standard AMCI 2d instructions, despite the use of AMCI 2d 401 *et seq.*, could be misleading. The jury might believe that it must find that the accomplice committed the act done by the principal. In such cases, the words "or an accomplice" may be inserted after the name of the defendant(s) in appropriate places in the instruction defining the offense.

AMCI 2d 401 should be given immediately prior to the instructions on the substantive offenses in these cases.

If the issue is merely whether the accomplices acted together in causing a particular result as an element of this offense, as specified in Ark. Code Ann. § 5-2-403(b), this instruction should be appropriately modified.

Where appropriate, AMCI 2d 404 (Mere Presence Instruction) should be given.

COMMENT

Ark. Code Ann. § 5-2-401 to 403.

When there is no evidence that the defendant participated with or was aided by anyone else, it is error to give an instruction permitting the jury to convict on the theory that the defendant had an accomplice who committed the offense. *Orsini v. State*, 286 Ark. 283, 691 S.W.2d 175 (1985).

Where a person is charged as a principal in an offense committed by more than one person, it is not error to instruct the jury with respect to accomplice liability. *Jacobs v. State*, 317 Ark. 454, 465 (1994), *citing Parker v. State*, 265 Ark. 315, 325 (1979).

It is not error for the trial court to refuse to give a modified version of AMCI 2d 401 containing examples of conduct not giving rise to accomplice liability. *Moore v. State*, 317 Ark. 630 (1994) ("It would be a practical impossibility for the trial court to instruct the jury on the type of conduct that does not give rise to accomplice liability." *Moore v. State*, 317 Ark. 630, 633 (1994) [*emphasis in original*]).

"It was not error for the court to instruct on accomplice liability with AMCI 401 even though the defendant's accomplice status was not alleged in the felony information." *Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007).

Trial court did not err in instructing the jury on accomplice liability where defendant was on notice that accomplice liability might be an issue because defendant was charged with committing battery in concert with two or more persons. There is no need to expressly charge a defendant as an accomplice to obtain a conviction based on accomplice liability. *McMurray v. State*, 101 Ark. App. 361, 278 S.W.3d 122 (2008).

"Where accomplice liability arises as a result of legal duty it is appropriate for the court to instruct on legal duty." *Hutcheson v. State*, 92 Ark. App. 307, 213 S.W.3d 25 (2005).

"Ark. Code Ann. 5-2-406 only applies when two or more codefendants are being tried together or where the criminal liability of other codefendants has previously been decided." *Wilson v. State*, 364 Ark. 550, 222 S.W.3d 171 (2006).

The trial court erred by refusing appellant's request to submit the issue of accomplice status to the jury because the evidence supported that the shooting may have been prompted by revenge, the familial relations of the witnesses to appellant, and the conflicting explanations for the trip given by the witnesses; therefore, the jury could have found that the two witnesses knew the real purpose of the trip from its inception and were intentionally assisting appellant in the commission of the crimes. *Brooks v. State*, 2014 Ark. App. 84.

The failure to give the "mere presence" jury instruction (AMI-Criminal 404), even when it is properly requested, cannot be reversible error when AMI-Criminal 401 is given. However, the failure to give the instruction will be reversible error when the omission affects the entire trial such that the resulting conviction violates due process. Additionally, because AMI-Criminal 401 is a complete and accurate statement of Arkansas law on accomplice liability, it is not error to

instruct the jury on the entirety of it. *Brown v. State*, 2015 Ark. App. 427, 468 S.W.3d 282.

Whether two individuals, who were with appellant at the time the crime for which he was convicted occurred, were accomplices was a mixed question of law and fact rather than only a question of law. *West v. State*, 2017 Ark. App. 416. Thus, instructing the jury that they were accomplices as a matter of law would have been improper. *Id.*

AMCI 2d 401-D
ACCOMPLICES: AFFIRMATIVE DEFENSE

First: That _____ (defendant) terminated his complicity prior to the commission of the offense; and

Second: That he [wholly deprived his complicity of its effectiveness in the commission of the offense;] [or] [gave timely warning to appropriate law enforcement authorities;] [or] [(otherwise) made a proper effort to prevent the commission of the offense].

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-2-404(b).

Shrader v. State, 13 Ark. App. 17, 678 S.W.2d 777 (1984).

AMCI 2d 402
ACCOMPLICE STATUS UNDISPUTED—CORROBORATION

The witness(es) _____ (name(s)), according to [his] [their] **own testimony,** [was] [were] **what** [is] [are] **known as** [an] **accomplice(s). A person cannot be convicted of a felony upon the uncorroborated testimony of an accomplice. You cannot, therefore, convict** [the] [a] **defendant of _____ (felony(s) charged or included) upon the testimony of** [that witness] [those witnesses] **unless that testimony is corroborated by other evidence tending to connect the defendant(s) with the commission of the offense(s). The corroborating evidence is not sufficient if it merely shows that the offense(s)** [was] [were] **committed, and the circumstances thereof.** [The testimony of one accomplice is not sufficient to corroborate that of another accomplice.] **The sufficiency of the corroborating evidence** [direct or circumstantial] **is a matter for you to determine.**

[You may, however, convict (the) (a) defendant of _____ *(misdemeanor)* upon the uncorroborated testimony of an accomplice, because that offense is only a misdemeanor.]

NOTE ON USE

This instruction should be given when the undisputed evidence shows one or more witnesses to be accomplices and the sufficiency of the corroborating evidence presents an issue of fact for the jury. Use the bracketed reference to circumstantial evidence only when that term has been defined (*see* AMCI 2d 106). When the evidence presents an issue of fact as to the status of an accomplice, use AMCI 2d 403.

COMMENT

Ark. Code Ann. § 16-89-111. This instruction is modeled after one approved in *Smith v. State*, 199 Ark. 900, 136 S.W.2d 673 (1940).

AMCI 2d 403
ACCOMPLICE STATUS IN DISPUTE—CORROBORATION

A person cannot be convicted of a felony upon the uncorroborated testimony of an accomplice.

[An accomplice is one (who directly participates in the commission of an offense or) who, with the purpose of promoting or facilitating the commission of an offense:

(Solicits, advises, encourages or coerces another person to commit it;) (or)

(Aids, agrees to aid, or attempts to aid another person in planning or committing it;) (or)

(Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.)]

It is contended that the witness [es] _____ *(name(s))* [was] [were] [an] **accomplice(s). If you find that** [he was] [they were], **then** _____ **(defendant(s)) cannot be convicted of** _____ **(felony(s) being submitted) upon testimony of** [that] [those] **witness[es], unless that testimony is corroborated by other evidence tending to connect** _____ **(defendant(s)) with the commission of the offense(s). Evidence is not sufficient to corroborate the testimony of an accomplice if it merely shows that the offense(s)** [was] [were] **committed and the circumstances of the commission.** [The testimony of one accomplice is not alone sufficient to corroborate the testimony of another accomplice.] **The sufficiency of the corroborating evidence is for you to determine.**

If you find that _____ *(name)* was an Accomplice, you will so indicate on the Interrogatory to be given you. If you find _____ *(he (she)* was not an Accomplice, you will so indicate on the appropriate Interrogatory.

[You may, however, convict (the) (a) defendant of _____ *(misdemeanor)* upon the uncorroborated testimony of an accomplice, because that offense is only a misdemeanor.]

NOTE ON USE

This instruction should be given when an alleged accomplice has testified and the sufficiency of the corroborating evidence presents an issue of fact for the jury. The definition of an accomplice should not be given if AMCI 2d 401 has been given.

An Interrogatory should be submitted for each witness whose accomplice status is disputed. *See* AMCI 2d 403.1-VF.

COMMENT

Ark. Code Ann. §§ 5-2-403 and 16-89-111. When the status of a witness as an accomplice presents an issue of fact, the defense is entitled to have the question

submitted to the jury. *Jackson v. State*, 193 Ark. 776, 102 S.W.2d 546 (1937); *Simms v. State*, 105 Ark. 16, 150 S.W. 113 (1912).

A conspirator may also be an accomplice. *Shrader v. State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984).

Failure to request that issue of accomplice status be submitted to jury constituted ineffective assistance of counsel, but the error was harmless because other evidence corroborated the testimony of the alleged accomplices. *McGehee v. State,* 348 Ark. 395, 72 S.W.3d 867 (2002).

"When the status of a witness as an accomplice presents an issue of fact, the defense is entitled to have the question submitted to the jury." *Swinford v. State,* 85 Ark. App. 326, 154 S.W.3d 262 (2004).

Where there is insufficient evidence to support a finding that a witness is an accomplice, it is not error for the trial court to refuse to give this instruction. *Gilcrease v. State*, 2009 Ark. 298.

For an individual to be an accomplice, he must engage in one of the activities articulated in Ark. Code Ann. § 5-2-403 (Repl. 2006). *Bush v. State*, 374 Ark. 506 (2008).

The trial court committed reversible error in failing to give this instruction where evidence was presented upon which the jury could have concluded that a witness was an accomplice. *Hickman v. State*, 99 Ark. App. 363, 260 S.W. 3d 747 (2007).

AMCI 2d 403.1-VF
INTERROGATORY—ACCOMPLICE STATUS IN DISPUTE

Do you, the Jury, find by a preponderance of the evidence that _____ (*name*) was an accomplice?

YES _____

NO _____

_____
FOREMAN

DEFINITION

"Preponderance of the evidence" means the greater weight of the evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, then preponderance of the evidence standard has not been met.

NOTE ON USE

This instruction should be given in conjunction with AMCI 2d 403. A separate Interrogatory should be submitted for each witness whose accomplice status is in dispute.

COMMENT

Preponderance of the evidence definition was taken from AMCI 2d 601 and modified to remove references to "affirmative defense."

AMCI 2d 404
MERE PRESENCE

Mere presence, acquiescence, silence, or knowledge that a crime is being committed, in the absence of a legal duty to act, is not sufficient to make one an accomplice. Therefore, if you find that _____ *(defendant)* **was only present while a crime was being committed and did not have a legal duty to act, then he is not an accomplice.**

NOTE ON USE

This instruction should be given when requested by counsel or when the court feels that it would be helpful to the jury. If there is a jury question concerning whether one has a legal duty to act, counsel should draft the necessary instructions. *But see Moore v. State*, 317 Ark. 630, 636 (1994).

COMMENT

Ford v. State, 296 Ark. 8, 753 S.W.2d 258 (1988).

In *Jones v. State,* 336 Ark. 191, 984 S.W.2d 432 (1999), which was tried before the adoption of AMCI 2d 404, the trial court gave AMCI 2d 401 but refused to give a mere presence instruction requested by the defendant. The Supreme Court upheld the trial court, ruling that the general accomplice liability instruction (AMCI 2d 401) indicates to the jury that "mere presence" is not sufficient to convict a defendant as an accomplice. *See also Conner v. State,* 334 Ark. 457, 982 S.W.2d 655 (1998); *Smith v. State,* 334 Ark. 190, 974 S.W.2d 427 (1998); *Calloway v. State,* 330 Ark. 143, 953 S.W.2d 571 (1997); *Williams v. State,* 329 Ark. 8, 946 S.W.2d 678 (1995); *Webb v. State,* 326 Ark. 878, 935 S.W.2d 250 (1996).

Henderson v. State, 349 Ark. 701, 80 S.W.3d 374 (2002), unlike *Jones v. State,* above, was tried after the adoption of AMCI 2d 404. The court nevertheless adhered to earlier cases and held that failure to give a "mere presence" instruction requested by defendant was not reversible error because AMCI 2d 401 includes an implicit "mere presence" element.

This instruction is proper when evidence supports the conclusion that a witness was not an active participant in the crime. *Gilcrease v. State*, 2009 Ark. 298.

The failure to give the "mere presence" jury instruction (AMI-Criminal 404), even when it is properly requested, cannot be reversible error when AMI-Criminal 401 is given. However, the failure to give the instruction will be reversible error when the omission affects the entire trial such that the resulting conviction violates due process. *Brown v. State*, 2015 Ark. App. 427, 468 S.W.3d 282.

AMCI 2d 405
ACCOMPLICES—CULPABILITY

When two or more persons are criminally responsible for an offense, each person is liable only for the degree of the offense that is consistent with the person's own [culpable mental state] [or] [accountability for an aggravating fact or circumstance].

[By "culpable mental state," I mean [knowingly] [purposely] [recklessly] [negligently].]

Definitions

"Knowingly."—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purposely."—A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Recklessly."—A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that he circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation.

"Negligently."—A person acts negligently with respect to attendant circumstances or a result of his conduct when he should be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the defendant's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.

NOTE ON USE

This instruction is limited to instances where two or more defendants are being tried together or where the criminal liability of the other codefendants has previously been decided.

If it is necessary to define "culpable mental state," use the bracketed language and insert the mental state(s) that are presented in the instructed offenses.

COMMENT

Ark. Code Ann. § 5-2-406. There are four culpable mental states: purposely, knowingly, recklessly, and negligently. Ark Code Ann. §5-2-202.

Section 5-2-406 addresses the situation where two or more defendants are charged and tried together and where the degree of each defendant's culpability

may differ. *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999).

In Arkansas, an accomplice is entitled to a jury instruction allowing the jury to judge an accomplice's mental state separately from that of his or her principal. *Wilson v. State*, 364 Ark. 550 (2006). Where the defendant was tried alone and the liability of her two sons had not yet been determined, the circuit court correctly refused to give a jury instruction based on Ark. Code Ann. § 5-2-406. *Id.*

CHAPTER 5

CRIMINAL ATTEMPT, SOLICITATION, CONSPIRACY

SYNOPSIS

501. Criminal Attempt

502. Criminal Attempt—Attempt to Aid the Commission of an Offense

502-D1. Criminal Attempt—Affirmative Defense: Renunciation

502-D2. Criminal Attempt—Affirmative Defense; Mitigation

503. Criminal Solicitation.

503-D1. Criminal Solicitation—Affirmative Defense: Renunciation

503-D2. Criminal Solicitation—Affirmative Defense; Mitigation

504. Criminal Conspiracy

504-D1. Criminal Conspiracy—Affirmative Defense: Renunciation

504-D2. Criminal Conspiracy—Affirmative Defense: Mitigation

505. Criminal Conspiracy—Scope of Conspiratorial Relationship

506. Criminal Conspiracy—Non-Defenses

(Text continued on page 5-3)

AMCI 2d 501
CRIMINAL ATTEMPT

_____ *(Defendant(s))* [is] [are] **charged with the offense of attempted** _____ **(applicable offense). A person commits the offense of** _____ **(applicable offense) if** [insert statutory language from the definition of the applicable offense]. **To sustain the charge of attempted** _____ **(applicable offense) the State must prove** [the following things] **beyond a reasonable doubt:**

[First: That _____ **(defendant(s))** intended to commit the offense of _____ *(applicable offense)*;

Second: That _____ **(defendant(s))** purposely engaged in conduct that was a substantial step in a course of conduct intended to culminate in the commission of _____ *(applicable offense)*;

and

Third: That _____ **(defendant(s))**'s conduct was strongly corroborative of the criminal purpose.]

[That _____ ***(defendant(s))*** **purposely engaged in conduct that would have constituted the offense of** _____ ***(applicable offense)*** **had the circumstances been as (he) (they) believed them to be at the time of (his) (their) conduct.]**

Definition

"Purposely."—A person acts purposely with respect to his conduct when it is his conscious object to engage in the conduct.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

The first bracketed charge should be given in those situations where it is alleged that the defendant has been unable to complete his intended criminal conduct. It will cover the great majority of attempt situations. The second bracketed charge should be given in those situations where it is alleged the defendant has *completed* a course of conduct that would have been a crime if the circumstances were as defendant believed them to be. The attempt situation set out in subsection (2) of the statute is not covered by these model instructions due to the impossibility of drafting a single model instruction on the point.

The introduction provides for the definition of the offense attempted to be given in the language of the statute. If the evidence raises an issue as to one or more elements of the offense attempted, the court may prefer to use the language from the instruction for that offense.

COMMENT

Ark. Code Ann. § 5-3-201. "Purposely" is defined in Ark. Code Ann. § 5-2-202.

Criminal attempt is punished at one level below the offense attempted. Ark. Code Ann. § 5-3-203.

Where the evidence indicates that the steps taken by defendant have culminated in the commission of an offense, it is not error to give an instruction on the commission of the offense and refuse to give an instruction on the attempted commission of the offense. *Alexander v. State,* 78 Ark. App. 56, 77 S.W.3d 544 (2002) (upholding refusal to give attempted aggravated robbery instruction); *Thomas v. State*, 2012 Ark. App. 466.

(Text continued on page 5-5)

AMCI 2d 502

CRIMINAL ATTEMPT — ATTEMPT TO AID THE COMMISSION OF AN OFFENSE

_____ *(Defendant)* **is charged with the offense of attempting to aid in the commission of** _____ *(applicable offense).* **A person commits the offense of** _____ *(applicable offense)* **if** [insert statutory language from the definition of the applicable offense]. **To sustain the charge of attempted** _____ *(applicable offense)* **the State must prove** [the following things] **beyond a reasonable doubt:**

First: That _____ *(defendant)* [(solicited, advised, [or] encouraged) (or) (coerced) _____ *(another person)* to commit _____ *(applicable offense))*] [aided, agreed to aid, or attempted to aid _____ *(another person)* in the planning of _____ *(applicable offense)*] [having a legal duty to prevent the commission of _____ *(applicable offense)* failed to make a proper effort to do so].

Second: That he did so with the purpose of aiding the commission of _____ *(applicable offense).*

Definition

"Purpose." — A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

COMMENT

Ark. Code Ann. §§ 5-3-202; 5-2-402 and 403. Criminal attempt is punished at one level below the offense attempted. Ark. Code Ann. § 5-3-203. "Purpose" is defined in Ark. Code Ann. § 5-2-202.

AMCI 2d 502-D1

CRIMINAL ATTEMPT — AFFIRMATIVE DEFENSE: RENUNCIATION

[That he abandoned his efforts to commit _____ *(applicable offense)*, thereby preventing its commission, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose (or)]

[That he terminated his complicity in the commission of _____ *(applicable offense)* and (wholly deprived his complicity of effectiveness in the commission of_____ *(applicable offense)*) (or) (gave timely warning to an appropriate law enforcement authority) (or) (made a substantial effort to prevent the commission of the offense under circumstances manifesting a voluntary and complete renunciation of his criminal purpose).]

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use. The first bracketed paragraph is an affirmative defense to a charge under Ark. Code Ann. § 5-3-201. The second bracketed paragraph is an affirmative defense to a charge under § 5-3-202.

COMMENT

Ark. Code Ann. § 5-3-204.

AMCI 2d 502-D2

CRIMINAL ATTEMPT — AFFIRMATIVE DEFENSE: MITIGATION

That the conduct charged to constitute the attempt was inherently unlikely to result in the commission of a crime and neither the conduct nor the defendant presented a public danger warranting a criminal conviction.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-3-101.

AMCI 2d 503

CRIMINAL SOLICITATION

_____ *(Defendant)* **is charged with the offense of soliciting** _____ *(applicable offense)*. **A person commits the offense of** _____ *(applicable offense)* **if** [insert statutory language from the definition of the applicable offense]. **To sustain the charge of soliciting** _____ *(applicable offense)* **the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant)* **had the purpose of promoting or facilitating the commission of** _____ *(applicable offense)*; **and**

Second: With that purpose _____ *(defendant)* [commanded] [or] [urged or requested] _____ *(another person)* **to engage in conduct that would** [constitute _____ *(applicable offense)*]. [constitute an attempt to commit _____ *(applicable offense)*]. [cause _____ *(result specified in the definition of applicable offense)*]. [establish _____ *(another person)*'s complicity in the (commission) (or) (attempted commission) of _____ *(applicable offense)*].

Definition

"Purpose." — A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

The introduction provides for the definition of the offense solicited to be given in the language of the statute. If the evidence raises an issue as to one or more elements of the offense solicited, the court may prefer to use the language from the instruction for that offense.

COMMENT

Ark. Code Ann. § 5-3-301. Criminal solicitation is punished at one level below the offense solicited. Section 5-3-301. "Purpose" is defined in Ark. Code Ann. § 5-2-202.

AMCI 2d 503-D1

CRIMINAL SOLICITATION — AFFIRMATIVE DEFENSE: RENUNCIATION

That he prevented the commission of _____ *(applicable offense)* under circumstances manifesting a voluntary and complete renunciation of his criminal purpose.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-3-302.

AMCI 2d 503-D2

CRIMINAL SOLICITATION — AFFIRMATIVE DEFENSE: MITIGATION

That the conduct charged to constitute the solicitation was inherently unlikely to result in the commission of a crime and neither the conduct nor the defendant presented a public danger warranting a criminal conviction.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-3-101.

Defendant, who was charged with solicitation of capital murder, was not entitled to this instruction on the basis that her conduct was inherently unlikely to result in the commission of a crime because she never paid the purported assassin. *Jimenez v. State*, 83 Ark. App. 377, 128 S.W.3d 483 (2003).

(Text continued on page 5–17)

AMCI 2d 504

CRIMINAL CONSPIRACY

_____ *(Defendant(s))* [is] [are] **charged with the offense of conspiracy to commit** _____*(applicable offense)*. **A person commits the offense of** _____ *(applicable offense)* **if** [insert statutory language from the definition of the applicable offense]. **To sustain the charge of conspiracy to commit** _____ *(applicable offense)*, **the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant(s))* **had the purpose of promoting or facilitating the commission of** _____*(applicable offense)*;

Second: That with that purpose _____ *(defendant(s))* **agreed with** [_____ *(another person)*] [each other] [that one or more of them would engage in conduct that constituted _____] *(applicable offense)* [that _____ *(defendant(s))* would aid in the planning or commission of _____*(applicable offense)*]; **and**

Third: That _____ *(defendant(s))*, **or any other person with whom** [he] [they] **conspired, did an overt act in the pursuance of the conspiracy.**

Definition

"Purpose." — A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

The introduction provides for the definition of the basic offense to be given in the language of the statute. If the evidence raises an issue as to one or more elements of the basic offense, the court may prefer to use the language from the instruction for that offense.

COMMENT

Ark. Code Ann. § 5-3-401. "Purpose" is defined in Ark. Code Ann. § 5-2-202. Criminal conspiracy is punished at one level below the basic offense. Ark. Code Ann. § 5-3-404.

A conspiracy to commit multiple offenses constitutes a single conspiracy. Ark. Code Ann. § 5-3-403.

AMCI 2d 504-D1

CRIMINAL CONSPIRACY — AFFIRMATIVE DEFENSE: RENUNCIATION

[That he thwarted the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation of his criminal purpose (or)]

[That he terminated his participation in the conspiracy and (gave timely warning to appropriate law enforcement authorities) (or) (otherwise) (made a substantial effort to prevent the commission of _____ *(applicable offense)* under circumstances manifesting a voluntary and complete renunciation of his criminal purpose).]

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-3-405.

A co-conspirator may also be an accomplice. *Shrader v. State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984).

AMCI 2d 504-D2

CRIMINAL CONSPIRACY — AFFIRMATIVE DEFENSE: MITIGATION

That the conduct charged to constitute the conspiracy was inherently unlikely to result in the commission of a crime and neither the conduct nor the defendant presented a public danger warranting a criminal conviction.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-3-101.

AMCI 2d 505
CRIMINAL CONSPIRACY—SCOPE OF CONSPIRATORIAL RELATIONSHIP

If_____ **(defendant(s)) knew or could reasonably expect that** [_____] *(co-conspirator)* [person with whom (he) (they) conspired] **had conspired or would conspire with** [_____ *(a third person)*] [another person] **to commit the same offense, then** _____ **(defendant(s)) conspired with** [_____ *(a third person)*] [that other person] **whether or not he knew the identity of** [_____ *(a third person)*] [that other person].

NOTE ON USE

This charge should be given in conjunction with AMCI 2d 504 when there is a dispute as to the scope of the conspiracy and the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-3-402.

AMCI 2d 506
CRIMINAL CONSPIRACY—NON-DEFENSES

It is not a defense to a prosecution for [conspiracy] [or] [solicitation to commit an offense] that:

[The defendant or the person (whom the defendant solicited) (or) (with whom the defendant conspired) does not occupy a particular position or have a particular characteristic that is an element of that offense, if the defendant believed that one of the persons does.]

[The person (whom the defendant solicited) (or) (with whom the defendant conspired) is irresponsible or is immune to prosecution or conviction for the commission of the offense or has feigned agreement.]

[The person (whom the defendant solicited) (or) (with whom the defendant conspired) has not been charged with, prosecuted for, convicted of, or has been acquitted of an offense based upon the conduct alleged or has been convicted of a different offense or degree of offense, even if the defendant and the person (whom the defendant solicited) (or) (with whom the defendant conspired) were tried jointly.]

[The person (whom the defendant solicited) (or) (with whom the defendant conspired) could not be guilty of committing that offense because that person was unaware of the criminal nature of the conduct in question or of the defendant's criminal purpose.]

[The offense charged, as defined, can be committed only by a particular class of persons, and the defendant, not belonging to that particular class of persons, is for that reason legally incapable of committing the offense in an individual capacity unless imposing liability on the defendant is inconsistent with the purpose of the provision establishing the defendant's incapacity.]

NOTE ON USE

Use the bracketed paragraph(s) that the evidence warrants.

COMMENT

Ark. Code Ann. § 5-3-103.

CHAPTER 6

DEFENSES

SYNOPSIS

601. Affirmative Defenses—Burden of Proof
602. Culpable Mental State—General Provision
603. Causation—Definition
604. Mistake of Law
605. Affirmative Defenses: Involuntary Intoxication
605.1. Affirmative Defenses: Voluntary Intoxication
606. Affirmative Defenses: Duress
607. Affirmative Defenses: Entrapment
608. Alibi
609. Lack Of Criminal Responsibility Due To Mental Disease or Defect
610. Effect of Mental Disease or Defect on Mental State

(Text continued on page 6-3)

AMCI 2d 601

AFFIRMATIVE DEFENSES — BURDEN OF PROOF

_____ *(Defendant(s))* **assert(s)** [an] [the] **affirmative defense(s)** [of] _____**to the charge(s) of** _____ . **To establish this defense,** [defendant] **must prove:**

[Here insert the appropriate language from the AMCI 2d affirmative defense instruction.]

_____ *(Defendant(s))* [has] [have] **the burden of proving an affirmative defense by a preponderance of the evidence, unless the affirmative defense is so proved by other evidence in the case. "Preponderance of the evidence" means the greater weight of the evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If the evidence with regard to** [the] [any] **affirmative defense appears to be equally balanced, or if you cannot say upon which side it weighs heavier, then** [the] [that] **affirmative defense has not been established.**

If you find that this defense has been established [by (either) (any) defendant], **then you shall find** [that defendant] [_____ *(defendant)*] **not guilty of** _____ *(offense(s))*.

Whatever may be your finding as to this defense, you are reminded that the State still has the burden of establishing the guilt of [_____ *(defendant)*] [each defendant] **upon the whole case beyond a reasonable doubt.**

NOTE ON USE

Affirmative defenses are so designated in the Criminal Code. In this book affirmative defense instructions that are peculiar to a particular offense immediately follow the instruction defining that offense. Affirmative defense instructions that are not peculiar to a particular offense are contained in this chapter. In either case the affirmative defense instruction must be inserted after the first paragraph of this instruction.

COMMENT

Ark. Code Ann. § 5-1-111.

AMCI 2d 602

CULPABLE MENTAL STATE — GENERAL PROVISION

The State must also prove beyond a reasonable doubt that _____ *(defendant(s))* [purposely] [or] [knowingly] [or] [recklessly] **engaged in the prohibited conduct.**

Definitions

"Knowingly." — A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purposely." — A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Recklessly." — A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation.

NOTE ON USE

This general instruction on culpable mental states may be given immediately following the charge on any offense that does not set out a culpable mental state, except where the offense is one of strict liability.

COMMENT

Ark. Code Ann. § 5-2-204.

The definitions are found in § 5-2-202.

AMCI 2d 603

CAUSATION — DEFINITION

In these instructions you [will be] [have been] **told that the State must prove that** _____ *(defendant(s))* **caused a particular result. Causation exists when the result would not have occurred except for the conduct of** [_____ *(defendant)*] [a particular defendant] **operating either alone or together with another cause, unless the other cause was clearly sufficient to produce the result and the conduct of** [_____ *(defendant)*] [the particular defendant] **was clearly insufficient by itself.**

NOTE ON USE

This definition should be given when requested by counsel or when the court feels that it will be helpful to the jury. When multiple defendants are involved, each should be named in the first blank, and the second alternative should be used in each of the two following bracketed alternatives.

COMMENT

Ark. Code Ann. § 5-2-205.

AMCI 2d 604

MISTAKE OF LAW

First: That he engaged in the conduct charged believing that the conduct did not constitute the offense; and

Second: That he acted in reasonable reliance upon an official statement of the law contained in:

[A statute (or other enactment) afterward determined to be invalid or erroneous]

[The latest judicial decision of _____] *(highest state or federal court)*

[An official interpretation of _____] *(public servant or agency).*

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-2-206(c).

A mistake of law other than as to the existence or meaning of the statute under which the defendant is prosecuted may be relevant to disprove the specific culpable mental state required by the statute under which the defendant is prosecuted. Ark. Code Ann. § 5-2-206(e).

AMCI 2d 605

AFFIRMATIVE DEFENSES: INVOLUNTARY INTOXICATION

First: That he was intoxicated at the time of the alleged_____ *(offense(s))*;

Second: That as a result of that intoxication he lacked the capacity to [conform his conduct to the requirements of the law] [or] [appreciate the criminality of his conduct]; **and**

Third: That the intoxication was not the result of knowingly taking a substance which he knew or ought to have known would cause him to be intoxicated.

Definition

"Intoxication" is a disturbance of a person's mental or physical capacities as a result of taking alcohol or drugs or other substance into his body.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-2-207.

In *Standridge v. State,* 329 Ark. 473, S.W.2d 299 (1997), the trial court instructed the jury that: "Voluntary intoxication is not a defense to any criminal offense in Arkansas." On appeal the defendant argued that voluntary intoxication should be considered as a factor in the mental state of a defendant charged with a specific intent crime. He also argued that the instruction given by the trial court was an impermissible comment on the evidence. The Supreme Court rejected both arguments.

AMCI 2d 605.1
AFFIRMATIVE DEFENSES: VOLUNTARY INTOXICATION

Voluntary intoxication is not a defense to any criminal offense in Arkansas.

COMMENT

"Voluntary intoxication is not a defense to any criminal offense in Arkansas." *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

The circuit court did not abuse its discretion in giving AMCI 2d 605.1 over the defendant's objection where there was evidence in the record that the defendant used drugs on the night of the murders and was "huffing" paint and glue after the murders occurred. *Miller v. State*, 2010 Ark. 1, ___ S.W.3d ___.

(Text continued on page 6-15)

AMCI 2d 606

AFFIRMATIVE DEFENSES: DURESS

That he engaged in the conduct charged because he reasonably believed he was compelled to do so by the threat or use of unlawful force against [his person] [or] [the person of another] **that an individual of ordinary firmness in _____ 's** *(defendant)* **situation would not have resisted.**

[Duress is not a defense if _____*(defendant)* recklessly placed himself in a situation in which it was reasonably foreseeable that he would be subjected to the force or threatened force.]

Definition

"Recklessly." — A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

The definition should be given when requested by counsel or when the court feels that it would be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-2-208.

"Recklessly" is defined in § 5-2-202.

Duress may be an affirmative defense even when the affirmative defense of entrapment is also raised. *Williams v. State*, 22 Ark. App. 253, 735 S.W.2d 174 (1987).

AMCI 2d 607
AFFIRMATIVE DEFENSES: ENTRAPMENT

That a law enforcement officer [or any person acting in cooperation with him] induced the commission of the offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-2-209.

Duress may be an affirmative defense even when the affirmative defense of entrapment is also raised. *Williams v. State*, 22 Ark. App. 253, 739 S.W.2d 174 (1987).

A defendant who denies committing the offense is not entitled to an entrapment instruction. *Pyle v. State,* 340 Ark. 53, 8 S.W.3d 491 (2000); Montgomery v. State, 367 Ark. 485, 241 S.W.3d 753 (2006) WL 3030687.

A defendant is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment, even if the defendant denies one or more elements of the crime. *Smoak v. State*, 2011 Ark. 529, 385 S.W.3d 257 (2011).

(Text continued on page 6-19)

AMCI 2d 608

ALIBI

COMMENT

While alibi instructions have often been used by trial courts in Arkansas, alibi is neither a defense nor an affirmative defense under the Arkansas Criminal Code, but rather a position the defendant may assert to create a reasonable doubt of his guilt. Therefore, no jury instruction should be given. *See* 21 Am. Jur. 2d, Criminal Law, § 136; *Blaney v. State*, 280 Ark. 253, 657 S.W.2d 531 (1983); *Harkness v. State*, 267 Ark. 274, 590 S.W.2d 277 (1979).

AMCI 2d 609
LACK OF CRIMINAL RESPONSIBILITY DUE TO MENTAL DISEASE OR DEFECT

_____ *(Defendant)* asserts the affirmative defense of lack of criminal responsibility due to mental disease or defect. If, after considering all the evidence, you are convinced beyond a reasonable doubt that _____ *(defendant)* engaged in the conduct alleged to constitute the offense [or some lesser offense], **you should then consider the defense of lack of criminal responsibility.**

A person is not criminally responsible for his conduct if at the time of that conduct, as a result of mental disease or mental defect, he lacked the capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

_____ *(Defendant)* has the burden of proving the defense by a preponderance of the evidence, unless the defense is so proved by other evidence in the case. ["Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If the evidence with regard to this defense appears equally balanced, or if you cannot say upon which side it weighs heavier, then the defense has not been established.]

If you find that this defense has been established then you must find _____ *(defendant)* not guilty on the ground of lack of criminal responsibility. Whatever may be your finding as to this defense, you are reminded that the state still has the burden of establishing the guilt of _____ *(defendant)* upon the whole case beyond a reasonable doubt.

If you find _____ (defendant) not guilty on the ground of lack of criminal responsibility, the court will conduct a hearing. If the court determines that _____ (defendant) is no longer affected by mental disease or defect, the court will immediately discharge _____ *(defendant)*. If the court determines that _____ *(defendant)* remains affected by mental disease or defect, the court will order the defendant committed to the custody of the Department of Health and Human Services for an examination by a psychiatrist or licensed psychologist. The defendant will not be released from custody unless it is determined that _____ *(defendant's)* release would not create a substantial risk of bodily injury to another person or serious damage to property of another person.

Definitions

"Intoxication" is a disturbance of a person's mental or physical capacities as a result of taking alcohol or drugs or other substances into the body.

"Lack of criminal responsibility" means that due to a mental disease or defect a defendant lacked the capacity at the time of the alleged offense to either:

(A) appreciate the criminality of his or her conduct; or

(B) conform his or her conduct to the requirements of the law.

"Mental disease or defect" refers to (a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life) (or) (having a state of significantly subaverage general intellectual functioning existing concurrently with defects of adaptive behavior which developed during the developmental period) (or) (a significant impairment in cognitive functioning acquired as a direct consequence of a brain injury or resulting from a progressively deteriorating neurological condition). "Mental disease or defect" does not include (an abnormality manifested only by repeated criminal or otherwise antisocial conduct) (an abnormality manifested only by continuous or noncontinuous periods of intoxication caused by substances such as alcohol or drugs) (an abnormality manifested only by dependence upon or addiction to any substance such as alcohol or drugs).

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury. The bracketed definition of "preponderance of the evidence" need not be repeated if it has already been given in another instruction.

COMMENT

Ark. Code. Ann § 5-2-301 *et seq.*

Ark. Code Ann. § 5-2-312(a)(2) requires that the jury be instructed regarding the disposition of a defendant acquitted on the ground of lack of criminal responsibility. "Lack of criminal responsibility" and "Mental disease or defect" are defined in Ark. Code. Ann. § 5-2-301. "Intoxication" is defined in Ark. Code Ann. § 5-2-207.

Lack of criminal responsibility is an affirmative defense. Ark. Code. Ann. § 5-2-312. Defendant has the burden of proving this affirmative defense. *Mask v. State,* 314 Ark. 25, 858 S.W.2d 108 (1993). Because appellant failed to present evidence to support the affirmative defense of mental disease or defect, the circuit court did not abuse its discretion when it refused to give AMCI Crim. 2d 609 and 610. *Cage v. State*, 2017 Ark. 277.

Ark. Code Ann. § 5-2-301(6) provides that mental disease or defect does not include an abnormality manifested only by repeated criminal or otherwise antisocial behavior, an abnormality manifested only by periods of intoxication caused by substances such as alcohol or drugs, or an abnormality manifested only by dependence upon or addiction to any substance such as alcohol or drugs. The Committee felt that if the only evidence adduced in support of mental disease or

defect was repeated criminal conduct, periods of intoxication, or addiction to alcohol or drugs, then as a matter of law defendant would not be entitled to have this defense submitted to the jury.

The trial court erred in refusing to give the instruction on the defense of mental disease or defect where conflicting testimony from two expert witnesses concerning defendant's sanity at the time of the shooting created a fact question for the jury. Omitting the instruction was a structural error and thus not subject to harmless error review. *Teater v. State*, 89 Ark. App. 215, 201 S.W.3d 442 (2005).

AMCI 2d 610
EFFECT OF MENTAL DISEASE OR DEFECT ON MENTAL STATE

If you find that the defense of mental disease or defect has not been established, evidence that _____ *(defendant)* suffered from a mental disease or defect may still be considered by you in determining whether _____ *(defendant)* had the required mental state to commit the offense charged _____ (or a lesser included offense).

NOTE ON USE

It was the Committee's view that the defendant is not entitled to have this instruction submitted to the jury unless the defendant asserts the affirmative defense of mental disease or defect.

COMMENT

This instruction is required by Act 248 of 2001, which expressly overruled the holdings in *Riggs v. State,* 339 Ark. 111, 3 S.W.3d 305 (1999); *Westbrook v. State,* 274 Ark. 309, 624 S.W.2d 433 (1981); *Robinson v. State,* 269 Ark. 90, 598 S.W.2d 421 (1980). *See* Arkansas Code Revision Commission Notes to Ark. Code Ann. § 5-2-312.

Defendant did not assert a defense of mental disease or defect and was therefore not entitled to have her proffered, modified version of this instruction given. *Sharp v. State*, 90 Ark. App. 81, 204 S.W.3d 68 (2005).

Chapter 7

JUSTIFICATION

701. Justification — Execution of Public Duty

702. Justification — Choice of Evils

703. Justfication — Use of Physical Force Generally

704. Justification — Use of Physical Force in Defense of a Person

705. Justification — Use of Deadly Physical Force in Defense of a Person

706. Justification — Use of Physical Force in Defense of Premises

707. Justification — Use of Physical Force in Defense of Property

708. Justification — Use of Physical Force in Making an Arrest or Preventing an Escape

708.1 Justification — Use of Physical Force Against Law Enforcement Officer Employing Excessive Force to Make an Arrest

709. Justification — Use of Physical Force to Prevent Escape From a Correctional Facility

710. Justification — Reckless or Negligent Use of Force — Injury or Risk to Third Parties

AMCI 2d 701

JUSTIFICATION — EXECUTION OF PUBLIC DUTY

_____ *(Defendant(s))* **assert(s) as a defense to the charge of** _____ *(offense(s))* that [he was] [they were] **performing a public duty. This is a defense only if** _____ *(defendant(s))* **reasonably believed** [his] [their] **conduct was required or authorized** [by law] [by the judgment or direction of a court (or tribunal)] [in the lawful execution of legal process] [to assist a public servant in the performance of his duties].

_____ *(Defendant(s))*, **in asserting this defense,** [is] [are] **required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to** [his] [their] **guilt of** _____ *(offense(s))*, **then you must find** [him] [them] **not guilty.**

Definition

"Reasonable belief." — means the belief that an ordinary, prudent man would form under the circumstances in question and one not recklessly or negligently formed.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

COMMENT

"Reasonable belief" is defined in Ark. Code Ann. § 5-1-102(18).

AMCI 2d 702
JUSTIFICATION — CHOICE OF EVILS

_____ *(Defendant(s))* **assert(s) as a defense to the charge of**_____**(offense(s)) that** [he was] [they were] **forced by circumstances to choose between evils. This is a defense only if:**

First: [His] [Their] **conduct was necessary as an emergency measure to avoid an immediate public or private injury; and**

Second: The desirability and urgency of avoiding that public or private injury outweighed, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prohibiting_____**(offense(s)).**

[This defense is not available if you find that _____ *(defendant(s))* (was) (were) (reckless) (or) (negligent) (in bringing about a situation requiring a choice of evils) (in appraising the necessity for [his] [their] conduct).]

_____ *(Defendant(s))*, **in asserting this defense,** [is] [are] **required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to** [his] [their] **guilt of**_____**(offense(s)), then you must find** [him] [them] **not guilty.**

NOTE ON USE

The bracketed paragraph should only be used when the offense with which the defendant is charged, or a lesser included offense, requires only proof of recklessness or negligence to convict.

COMMENT

Ark. Code Ann. § 5-2-604.

"[T]he choice of evils instruction should not be given in a homicide case when self-defense is argued by the defendant." *Hart v. State*, 296 Ark. 290, 292, 756 S.W.2d 451, 452 (1988).

In order for the choice of evils defense to be available, there must be proof of extraordinary attendant circumstances requiring emergency measures to avoid an imminent public or private injury. *Pursley v. State*, 21 Ark. App. 107, 730 S.W.2d 250 (1987).

Defendant, a convicted felon, was not entitled to this instruction when he possessed a firearm in order to pawn it to get money for his family. *Prodell v. State*, 102 Ark. App. 360 (2008).

AMCI 2d 703
JUSTIFICATION — USE OF PHYSICAL FORCE GENERALLY

COMMENT

Ark. Code Ann. § 5-2-605 provides a limited justification for the use of physical force by persons who have special responsibility for the health, safety, and well-being of others (teachers, doctors, etc.). The Committee believes that this section is intended more as guidance in determining whether to prosecute than as the basis for special jury instructions. While a jury instruction based on this section may sometimes be required, it is believed this would be the exceptional case. Accordingly, no model instructions have been prepared.

AMCI 2d 704
JUSTIFICATION—USE OF PHYSICAL FORCE IN DEFENSE OF A PERSON

_____ *(Defendant(s))* **assert(s) as a defense to the charge of** _____ **(offense(s)) that** [he was] [they were] **defending** [himself] [themselves] [or] [_____ *(another person)*] [another person]. **This is a defense only if:**

First: _____ **(Defendant(s)) reasonably believed that** _____ **(victim) was using or about to use unlawful physical force upon** [him] [them] [_____ *(another person)*] [another person]; **and**

Second: _____ **(Defendant(s)) only used such force which** [he] [they] **reasonably believed to be necessary.** [_____ *(Defendant(s))* would not have been justified in using physical force upon another if:

(a) (with the purpose to cause physical injury or death to _____ *(victim)*, defendant(s) provoked the use of unlawful physical force); (or)

(b) ([he was] [they were] the initial aggressor(s). [However, if you find that _____ *(defendant(s))* withdrew from the encounter and effectively communicated to the other person (his) (their) intent to withdraw, then the defendant(s) (was) (were) no longer the initial aggressor(s) when the other person continued or threatened to continue the use of unlawful physical force]); (or)

(c) (the physical force involved was the product of combat by agreement which was not authorized by law.)]

_____ *(Defendant(s))*, **in asserting this defense,** [is] [are] **required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, of if the evidence leaves you with a reasonable doubt as to** [his] [their] **guilt of** _____ **(offense(s)), then you must find** [him] [them] **not guilty.**

[However, if you find that _____ *(defendant)* ((recklessly (or) (negligently) formed the belief that (he) (she) was justified in acting in (self defense) (defense of a third party)) (or) ((recklessly) (or) (negligently) employed an excessive degree of physical force), justification is not a defense to _____ *(charge or lesser charge with recklessness or negligence as a culpable mental state)*]

Definitions

"Physical force"—means any bodily impact, restraint, or confinement, or the threat thereof.

"Reasonably believes" or "reasonable belief"—means the belief that an

ordinary, prudent man would form under the circumstances in question and one not recklessly or negligently formed.

"Recklessly."—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation.

The term "negligently" as used in this criminal case means more than it does in civil cases. To prove negligence in a criminal case the State must show beyond a reasonable doubt that (defendant) should have been aware of a substantial and unjustifiable risk that the death would occur. The risk must have been of such a nature and degree that his failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involved a gross deviation from the standard of care that a reasonable person would have observed in his situation.

"Unlawful physical force"—means physical force that is employed without the consent of the person against whom it is directed and the employment of which constitutes a criminal offense or tort or would constitute such an offense or tort except for a defense other than the defense of justification or privilege.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

See Ark. Code Ann. § 5-2-615 for use of force by a pregnant woman in defense of an unborn child. If applicable, this instruction may need to be modified.

COMMENT

Ark. Code Ann. § 5-2-606.

"Reasonably believes" or "reasonable belief" is defined in Ark. Code Ann. § 5-1-102(18). "Physical force" and "unlawful physical force" are defined in Ark. Code Ann. § 5-2-601(3) and (4).

The Committee believes that the presumption set forth in Ark. Code Ann. § 5-2-620 in favor of a person defending himself in his home has no effect. If evidence is introduced to trigger the presumption, that same evidence supports the existence of the defense. Under Ark. Code Ann. § 5-1-111(a)(1) and (c) and Ark. Code Ann. § 5-1-102(5)(C), the prosecution has the burden to prove as an element of its case the negation of any defense beyond a reasonable doubt. A presumption running in the defendant's favor which may be defeated by clear and convincing evidence by the state, but which also supports a defense which ultimately must be overcome by the state by evidence beyond a reasonable doubt, is of no effect.

Ark. Code Ann. § 5-2-620 mandates an appropriate justification instruction when some evidence of a defense has been introduced.

See also Doles v. State, 275 Ark. 448, 631 S.W.2d 281 (1982).

This instruction has been modified to take into account the Supreme Court's ruling in *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308, in which the Supreme Court held that the language of Ark Code Ann. 5-2-614(a) could not be interpreted to bar an assertion of the defense of justification in a manslaughter prosecution.

In *Humphrey v. State,* 332 Ark. 398, 966 S.W.2d 213 (1998), the Supreme Court reversed a capital murder conviction where there was evidence sufficient to support an instruction on self-defense.

Trial court did not err in refusing to give this instruction with regard to first and second degree assault because justification is not a defense to first and second degree assault. *Merritt v. State*, 82 Ark. App. 351, 107 S.W.3d 894 (2003).

Because appellant used "deadly physical force" when he struck the victim in the head with a shotgun, the trial court correctly determined that AMCI 705 rather than AMCI 704 was the appropriate self-defense jury instruction in appellant's murder trial. *Stalnaker v. State*, 2014 Ark. App. 412, 437 S.W.3d 700.

AMCI 2d 705
JUSTIFICATION—USE OF DEADLY PHYSICAL FORCE IN DEFENSE OF A PERSON

_____ *(Defendant(s))* **assert(s) as a defense to the charge of** _____ *(offense(s))* **that deadly physical force was necessary to defend** [himself] [themselves] [or] [_____ *(another person)*]. **This is a defense only if:**

First: *[one or more options may be inserted]* [_____ *(Defendant(s))* reasonably believed that _____ *(victim)* was committing or was about to commit _____ *(felony)*, with force or violence;]

[_____ *(Defendant(s))* reasonably believed that _____ *(victim)* was using or was about to use unlawful deadly physical force;]

[_____ *Defendant* reasonably believed that (her life was in imminent danger from) (or) (_____ *(victim)* was imminently about to victimize her in) the continuation of a pattern of domestic abuse;]

And second: [_____ *(Defendant(s))* only used such force as [he] [they] reasonably believed to be necessary.]

[A person is not justified in using deadly physical force if he knows that the use of deadly physical force can be avoided.

(a) (by retreating.) (However, he is not required to retreat if he is [unable to retreat with complete safety] [(in his dwelling) (on the curtilage surrounding his dwelling) and was not the original aggressor] [a law enforcement officer acting in the line of duty] [assisting at the direction of a law enforcement officer].)

(b) (with complete safety by surrendering possession of property to a person who claims a lawful right to it.)]

_____ *(Defendant(s))*, **in asserting this defense,** [is] [are] **required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to** [his] [their] **guilt of** _____ *(offense(s))*, **then you must find** [him] [them] **not guilty.**

[However, if you find that _____ *(defendant)* ((recklessly (or) (negligently) formed the belief that (he) (she) was justified in acting in (self defense) (defense of a third party)) (or) ((recklessly) (or) (negligently) employed an excessive degree of physical force), justification is not a defense to _____ *(charge or lesser charge with recklessness or negligence as a culpable mental state)*]

Definitions

"Curtilage"—means the land adjoining a dwelling that is convenient for residential purposes and habitually used for residential purposes, but not necessarily enclosed, and includes an outbuilding that is directly and intimately connected with the dwelling and in close proximity to the dwelling.

"Deadly physical force"—means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.

"Domestic abuse"—means:

(A) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; or

(B) Any sexual conduct between family or household members, whether minors or adults, which constitutes a crime under the laws of this state;

[See AMCI 2d 2610 for additional definitions which may be needed with this definition of domestic abuse.]

"Dwelling"—means an enclosed space that is used or intended to be used on a temporary or permanent basis as a human habitation, home, or residence.

"Law enforcement officer"—means any public servant vested by law with a duty to maintain public order or to make arrests for offenses.

The term "negligently" as used in this criminal case means more than it does in civil cases. To prove negligence in a criminal case the State must show beyond a reasonable doubt that (defendant) should have been aware of a substantial and unjustifiable risk that the death would occur. The risk must have been of such a nature and degree that his failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involved a gross deviation from the standard of care that a reasonable person would have observed in his situation.

"Physical force"—means any bodily impact, restraint, or confinement, or the threat thereof.

"Reasonably believes" or "reasonable belief"—means the belief that an ordinary, prudent man would form under the circumstances in question and one not recklessly or negligently formed.

"Recklessly."—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation.

"Unlawful physical force"—means physical force that is employed without the consent of the person against whom it is directed and the employment of which constitutes a criminal offense or tort or would constitute such an offense or tort except for a defense other than the defense of justification or privilege.

NOTE ON USE

The definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury. The first and second bracketed paragraphs set forth the situation in which a jury may find that the defendant was justified in using deadly force.

In the first element, one or more of the options may be inserted depending upon the evidence in the case.

See Ark. Code Ann. § 5-2-615 for use of force by a pregnant woman in defense of an unborn child. If applicable, this instruction may need to be modified.

COMMENT

Ark. Code Ann. § 5-2-607.

A law enforcement officer, or a person assisting at the direction of a law enforcement officer, is not required to retreat if he is acting in the line of duty. *See Smith v. State*, 59 Ark. 132, 26 S.W. 712 (1894).

"Reasonably believes" or "reasonable belief" is defined in Ark. Code Ann. § 5-1-102. "Deadly physical force" is defined in § 5-2-601(5). "Unlawful physical force" is defined in § 5-2-601(4). "Physical force" is defined in Ark. Code Ann. § 5-2-601(3). "Dwelling" is defined in Ark. Code Ann. § 5-2-601(2). "Law enforcement officer" is defined in Ark. Code Ann. § 5-1-102(12).

The Committee believes that the presumption set forth in Ark. Code Ann. § 5-2-620 in favor of a person defending himself in his home has no effect. If evidence is introduced to trigger the presumption, that same evidence supports the existence of the defense. Under Ark. Code Ann. § 5-1-111(a)(1) and (c) and Ark. Code Ann. § 5-1-102(5)(C), the prosecution has the burden to prove as an element of its case the negation of any defense beyond a reasonable doubt. A presumption running in the defendant's favor which may be defeated by clear and convincing evidence by the state, but which also supports a defense which ultimately must be overcome by the state by evidence beyond a reasonable doubt, is of no effect.

Ark. Code Ann. § 5-2-620 mandates an appropriate justification instruction when some evidence of a defense has been introduced. *See also Doles v. State*, 275 Ark. 448, 631 S.W.2d 281 (1982); *Martin v. State*, 290 Ark. 293, 718 S.W.2d 938 (1986).

The defense of using deadly physical force in defense of another is only available to one who acts reasonably. *Smith v. State*, 30 Ark. App. 111, 783 S.W.2d 72 (1990), citing *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987).

In *Hollins v. State*, 80 Ark. App. 342, 96 S.W.3d 755 (2003), a defendant charged with unlawfully discharging a firearm from a vehicle in violation of Ark. Code Ann. § 5-74-107 argued that he was entitled to a self defense instruction. Held, Ark. Code Ann. § 5-2-614 made the defense unavailable because defendant recklessly or negligently created a substantial risk of injury to a third party.

Trial court did not err in refusing to give this instruction with regard to first and second degree assault because justification is not a defense to first and second degree assault. *Merritt v. State*, 82 Ark. App. 351, 107 S.W.3d 894 (2003).

"The trial court erred in failing to instruct the jury in the alternative that the defendant could claim the defense of justification if he believed that the victim was about to commit the crime of second degree battery or that the defendant

believed that the victim was about to use unlawful deadly physical force." *Hamilton v. State*, 97 Ark. App. 172, 245 S.W.3d 710 (2006).

The trial court's refusal to give the defendant's proffered instruction was not an abuse of discretion where defendant's proffered instruction incorrectly stated the law by inserting a justification defense that applied only to self-defense, not to the protection of third parties. *Mainard v. State*, 102 Ark. App. 210, 283 S.W.3d 627 (2008).

Because the location of appellant's crime was not within the curtilage of her home, the trial court did not abuse its discretion when it refused to include the optional language that discusses the curtilage. *Moody v. State*, 2014 Ark. App. 538, 444 S.W.3d 389.

This instruction has been modified to take into account the Supreme Court's ruling in *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308, in which the Supreme Court held that the language of Ark Code Ann. 5-2-614(a) could not be interpreted to bar an assertion of the defense of justification in a manslaughter prosecution.

Because the evidence established that appellant did not use all reasonable means to avoid killing his victim, and in fact had retreated and then returned with a weapon to kill the alleged aggressor, there was no rational basis for instructing the jury on the justification defense. *Crews v. State*, 2017 Ark. App. 670.

AMCI 2d 706 JUSTIFICATION—USE OF PHYSICAL FORCE IN DEFENSE OF PREMISES

_____ *(Defendant(s))* **assert(s) as a defense to the charge of**_____**(offense(s)) that** [he was] [they were] **defending** [_____] *(describe premises)* [or] [a vehicle].

[A person may use non-deadly physical force to defend (premises) (or) (a vehicle) only if:

he is in lawful possession or control of the (premises) (or) (vehicle); and

he reasonably believes that it is necessary to use physical force to terminate the (commission) (or) (attempted commission) of a criminal trespass by another person; and,

the extent and necessity of the force used would appear to be necessary to an ordinary, prudent man under the same or similar circumstances.]

[A person may use deadly physical force to defend (premises) (or) (a vehicle) only if:

(a) (he is in lawful possession or control of the [premises] [or] [vehicle]; and

he reasonably believes that it is necessary to use deadly physical force to prevent the commission of [arson] [or] [burglary] by a trespasser; and the extent and necessity of the force used would appear to be necessary to an ordinary, prudent man under the same or similar circumstances.)

(b) (he is in lawful possession or control of the [premises] [or] [vehicle]; and

he reasonably believes another person is [committing or about to commit _____ *(felony)* with force or violence] [using or about to use unlawful deadly force]; and

the extent and necessity of the force used would appear to be necessary to an ordinary, prudent man under the same or similar circumstances.)]

[However, a person is not justified in using deadly physical force if he knows that the use of deadly force could have been avoided with complete safety:

(a) (by retreating.) (But a person is not required to retreat if he is [in his dwelling and was not the original aggressor] [a law enforcement officer acting in the line of duty] [assisting at the direction of a law enforcement officer].)

(b) (by surrendering the possession of property to a person who has a lawful right to it.)]

_____ *(Defendant(s))*, **in asserting this defense,** [is] [are] **required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to** [his] [their] **guilt of**_____**(offense(s)), then you must find** [him] [them] **not guilty.**

[However, if you find that _____ *(defendant)* ((recklessly (or) (negligently)

formed the belief that (he) (she) was justified in acting in (self defense) (defense of a third party)) (or) ((recklessly) (or) (negligently) employed an excessive degree of physical force), justification is not a defense to _____ *(charge or lesser charge with recklessness or negligence as a culpable mental state)*]

Definitions

"Occupiable structure."—means a vehicle, building, or other structure

[where any person lives or carries on a business or other calling]; [or]

[where people assemble for purposes of (business) (government) (education) (religion) (entertainment) (public transportation)]; [or]

[which is customarily used for overnight accommodation of persons]

whether or not a person is actually present.

A person commits "criminal trespass" if he purposely enters or remains unlawfully in or upon a vehicle or the premises of another person.

A person commits "arson" if he starts a fire or causes an explosion with the purpose of destroying or otherwise damaging [an occupiable structure of another person] [or] [any property of another person if he thereby negligently creates a risk of death or serious physical injury to any person] [or] [a vital public facility.]

A person commits "burglary" if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment.

"Premises."—means occupiable structures and any real property.

"Recklessly."—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation.

The term "negligently" as used in this criminal case means more than it does in civil cases. To prove negligence in a criminal case the State must show beyond a reasonable doubt that (defendant) should have been aware of a substantial and unjustifiable risk that the death would occur. The risk must have been of such a nature and degree that his failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involved a gross deviation from the standard of care that a reasonable person would have observed in his situation.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

The first alternative in brackets is to be used when a defendant asserts justification and deadly force is not used. This alternative is to be used when the

defendant alleges the force was necessary to stop or prevent criminal trespass as defined by the Code.

The second alternative in brackets is to be used when the defendant has used deadly physical force. Arson and burglary are defined in the Code as involving occupiable structures, and this may raise a question of fact regarding the nature of the structure. Deadly force may also be used if the victim was using or threatening to use physical force within the meaning of Ark. Code Ann.§ 5-2-607.

The third bracketed alternative incorporates the limits on deadly force set out in Ark. Code Ann. § 5-2-607. This alternative should be used if the evidence raises a question of fact concerning retreat.

COMMENT

Ark. Code Ann. § 5-2-608.

"Premises" and "occupiable structure" are defined in Ark. Code Ann. § 5-2-601. "Criminal trespass" is defined in Ark. Code Ann. § 5-39-203. "Arson" is defined in Ark. Code Ann. § 5-38-301. "Burglary" is defined in Ark. Code Ann. § 5-39-201.

A law enforcement officer, or a person assisting at the direction of a law enforcement officer, is not required to retreat if he is acting in line of duty. *See Smith v. State*, 59 Ark. 132, 26 S.W. 712 (1894).

The Committee believes that the presumption set forth in Ark. Code Ann. § 5-2-620 in favor of a person defending himself in his home has no effect. If evidence is introduced to trigger the presumption, that same evidence supports the existence of the defense. Under Ark. Code Ann. § 5-1-111(a)(1) and (c) and § 5-1-102(5)(C), the prosecution has the burden to prove as an element of its case the negation of any defense beyond a reasonable doubt. A presumption running in the defendant's favor which may be defeated by clear and convincing evidence by the state, but which also supports a defense which ultimately must be overcome by the state by evidence beyond a reasonable doubt, is of no effect.

Ark. Code Ann. § 5-2-620 mandates an appropriate justification instruction when some evidence of a defense has been introduced.

See also Doles v. State, 275 Ark. 448, 631 S.W.2d 281 (1982).

This instruction has been modified to take into account the Supreme Court's ruling in *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308, in which the Supreme Court held that the language of Ark Code Ann. 5-2-614(a) could not be interpreted to bar an assertion of the defense of justification in a manslaughter prosecution.

AMCI 2d 707 JUSTIFICATION—USE OF PHYSICAL FORCE IN DEFENSE OF PROPERTY

_____ *(Defendant)* asserts as a defense to the charge of_____(offense) that (he) **was defending property. This is a defense only if:**

First:_____ *(Defendant)* reasonably believed the use of physical force on _____ *(victim of the physical force)* was necessary to (prevent) (or) (terminate) **_____ *(victim's)* (commission) (or) (attempted commission) of** (theft) (or) (criminal mischief) **(or)_____((victim's) subsequent flight therefrom); and**

Second:_____Defendant did not use deadly physical force; and

Third: The extent of the force used would appear to be necessary to an ordinary, prudent person under the same or similar circumstances.

The defendant, in asserting this defense, is required only to raise a reasonable doubt in your minds. Consequently if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to (his) **guilt of_____(offense), then you must find_____(defendant) not guilty.**

[However, if you find that _____ *(defendant)* ((recklessly (or) (negligently) formed the belief that (he) (she) was justified in acting in (self defense) (defense of a third party)) (or) (recklessly) (or) (negligently) employed an excessive degree of physical force), justification is not a defense to _____ *(charge or lesser charge with recklessness or negligence as a culpable mental state)*]

Definitions

A person commits "theft of property" if he knowingly takes or exercises unauthorized control over the property of another person with the purpose of depriving the owner thereof.

A person commits "criminal mischief" if he [purposely destroys or causes damage to any property of another] [or] [recklessly destroys or damages any property of another] [or] [purposely tampers with any property of another and thereby causes substantial inconvenience to the owner or some other person].

"Deadly physical force."—means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.

"Recklessly."—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation.

The term "negligently" as used in this criminal case means more than it does in civil cases. To prove negligence in a criminal case the State must show beyond

a reasonable doubt that (defendant) should have been aware of a substantial and unjustifiable risk that the death would occur. The risk must have been of such a nature and degree that his failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involved a gross deviation from the standard of care that a reasonable person would have observed in his situation.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-2-609.

"Theft of property" is defined in Ark. Code Ann. § 5-36-103. "Criminal mischief" is defined in Ark. Code Ann. §§ 5-38-203 and -204. Both definitions have been modified to include the situations most likely to give rise to this defense. Unusual cases may require further modification. "Deadly physical force" is defined in Ark. Code Ann. § 5-2-601(5).

The Committee believes that the presumption set forth in Ark. Code Ann. § 5-2-620 in favor of a person defending himself in his home has no effect. If evidence is introduced to trigger the presumption, that same evidence supports the existence of the defense. Under Ark. Code Ann. § 5-1-111(a)(1) and (c) and Ark. Code Ann. § 5-1-102(5)(C), the prosecution has the burden to prove as an element of its case the negation of any defense beyond a reasonable doubt. A presumption running in the defendant's favor which may be defeated by clear and convincing evidence by the state but which also supports a defense which ultimately must be overcome by the state by evidence beyond a reasonable doubt is of no effect.

Ark. Code Ann. § 5-2-620 mandates an appropriate justification instruction when some evidence of a defense has been introduced.

See also Doles v. State, 275 Ark. 448, 631 S.W.2d 281 (1982).

This instruction has been modified to take into account the Supreme Court's ruling in *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308, in which the Supreme Court held that the language of Ark Code Ann. 5-2-614(a) could not be interpreted to bar an assertion of the defense of justification in a manslaughter prosecution.

AMCI 2d 708 JUSTIFICATION—USE OF PHYSICAL FORCE IN MAKING AN ARREST OR PREVENTING AN ESCAPE

_____ *(Defendant(s))* **assert(s) as a defense to the charge of**_____**(offense) that** [he was] [they were] [making an arrest] [or] [preventing an escape].

[A law enforcement officer may (use non-deadly physical force) (or) (threaten to use deadly physical force) upon another person when he reasonably believes it necessary:

(To effect an arrest) (or) (to prevent the escape from custody of an arrested person) (unless the officer knows that the arrest is unlawful); (or)

(To defend himself [or a third person] from what he reasonably believes to be the use or imminent use of physical force [while effecting or attempting to effect an arrest] [or] [while preventing or attempting to prevent an escape]).]

[A law enforcement officer may use deadly physical force upon another person when he reasonably believes that it is necessary:

(To effect an arrest of a person) (or) (to prevent the escape from custody of an arrested person) who he reasonably believes has committed (or attempted to commit) a felony; (or)

(To defend himself [or a third person] from what he reasonably believes to be the use or imminent use of deadly physical force).]

Defendant(s), in asserting this defense, [is] [are] **required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to** [his] [their] **guilt of**_____**(offense(s)), then you must find** [him] [them] **not guilty.**

Definition

"Reasonably believes."—means the belief that an ordinary, prudent man would form under the circumstances in question and one not recklessly or negligently formed.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

The material in the first bracketed paragraph is to be used when the defendant law enforcement officer used non-deadly force or threatened to use deadly force. The material in the second bracketed paragraph is to be used when the defendant law officer has used deadly physical force.

COMMENT

Ark. Code Ann. § 5-2-610.

AMCI 2d 708.1 JUSTIFICATION—USE OF PHYSICAL FORCE AGAINST LAW ENFORCEMENT OFFICER EMPLOYING EXCESSIVE FORCE TO MAKE AN ARREST

_____ *(Defendant(s))* **assert(s) as a defense to the charge of**_____**(offense) that** [he was] [they were] **defending** [himself] [themselves] [or] [_____ *(another person)*] [another person]. **This is a defense only if:**

First:_____**(Defendant(s)) reasonably believed that**_____**(victim)** [a law enforcement officer] [a private person ordered to assist a law enforcement officer] [a private person making an arrest] **was using or about to use unlawful physical force upon** [him] [them] [another person] [_____ *(another person)*]; **and**

Second:_____**(Defendant(s)) only used such force as** [he] [they] **reasonably believed to be necessary to prevent the use of unlawful physical force.**_____**(Defendant(s)), in asserting this defense,** [is] [are] **required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to** [his] [their] **guilt of**_____**(offense(s) charged), then you must find** [him] [them] **not guilty.**

Definitions

"Physical force."—means any bodily impact, restraint, or confinement, or the threat thereof.

"Reasonably believes" or "reasonable belief."—means the belief that an ordinary, prudent man would form under the circumstances in question and one not recklessly or negligently formed.

"Unlawful physical force."—means physical force in excess of that necessary to make the arrest.

NOTE ON USE

This defense will almost invariably be used against a charge of resisting arrest, interference with a law enforcement officer, assault, or battery. A reference to the appropriate offense should be included where indicated in the instruction.

COMMENT

The Ark. Code Ann. § 5-2-612 prohibition against using physical force to resist an arrest does not deprive one of the right to appropriate self-defense. "One may use such force as he reasonably believes necessary to defend against any *unlawful force* he reasonably believes a law enforcement officer is about to inflict upon him." *Carter & Thompson v. State*, 9 Ark. App. 206, 209, 657 S.W.2d 213, 215 (1983) (court's emphasis), citing *Barnes v. State*, 4 Ark. App. 84, 628 S.W.2d 334 (1982) and *Lucas v. State*, 5 Ark. App. 168, 634 S.W.2d 145 (1982). *See* Ark. Code Ann. §§ 5-2-606, -612.

The definition of unlawful physical force has been modified to emphasize that this defense comes into play only in cases where the proponent reasonably believes that excessive force is about to be used by the person making an arrest, not where the proponent has used physical force to prevent an arrest believed to be unlawful on other grounds.

In the rare case where the use of deadly physical force is sought to be justified, this instruction should be appropriately modified. *See* Ark. Code Ann. §§ 5-6-607, -612, and AMCI 2d 705.

AMCI 2d 709 JUSTIFICATION—USE OF PHYSICAL FORCE TO PREVENT ESCAPE FROM A CORRECTIONAL FACILITY

_____ *(Defendant(s))* **assert(s) as a defense to the charge of**_____**(offense(s)) that** [he was] [they were] **preventing the escape of a prisoner from a correctional facility.**

[A (law enforcement officer) (or) (guard) may use deadly physical force to the extent he reasonably believes it necessary to prevent an escape. (However, if he knows or should know that the prisoner(s) [has] [have] only been [charged with] [or] [convicted of] a misdemeanor, then he cannot use deadly force to prevent an escape.)]

[A (law enforcement officer) (or) (guard) may use non-deadly physical force to the extent he reasonably believes it necessary to prevent an escape.]

Defendant(s), in asserting this defense, [is] [are] **required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to** [his] [their] **guilt of**_____**(offense(s)), then you must find** [him] [them] **not guilty.**

Definitions

"Deadly physical force."—means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.

"Reasonably believes."—means the belief that an ordinary, prudent man would form under the circumstances in question and one not recklessly or negligently formed.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

The material in the first brackets is to be used when the defendant is charged with an offense involving deadly force. The material in the second brackets is to be used only when the defendant is charged with an offense involving non-deadly force.

COMMENT

Ark. Code Ann. § 5-2-613.

"Reasonably believes" is defined in Ark. Code Ann. § 5-1-102(18). "Deadly physical force" is defined in Ark. Code Ann.§ 5-2-601(5).

AMCI 2d 710 JUSTIFICATION—RECKLESS OR NEGLIGENT USE OF FORCE—INJURY OR RISK TO THIRD PARTIES

COMMENT

The decision of the Supreme Court in *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308, has rendered obsolete the previous treatment of Ark. Code Ann. 5-2-614(a) in these instructions. In *Schnarr*, the Supreme Court held that the language of Ark Code Ann. 5-2-614(a) could not be interpreted to bar an assertion of the defense of justification in a manslaughter prosecution.

Consequently, the justification instructions have been modified to take the *Schnarr* ruling into account.

For historical purposes, the previous comment read:

> The Committee believes there should be no jury instructions based on Ark. Code Ann. § 5-2-614. That section provides that the defense of justification is not available to a criminal charge that requires a reckless or negligent mental state if the actor was reckless or negligent in forming his belief or in employing excessive force. Since each of the basic justification provisions contains a requirement of "reasonableness" on the part of the actor, an additional jury instruction on Ark. Code Ann. § 5-2-614 becomes unnecessary.
>
> While it does not specifically so state, Ark. Code Ann. § 5-2-614 could be read to imply that the defense of justification would be available to a criminal charge requiring a purposeful or knowing mental state, even if the actor was reckless or negligent in forming his belief or in employing excessive force. Such an interpretation would negate the requirement of "reasonableness" found in the basic justification provisions. The Committee concluded that in light of the clear statutory language requiring reasonable behavior on the part of the actor, an interpretation of Ark. Code Ann. § 5-2-614 doing away with it is unwarranted.
>
> Ark. Code Ann. § 5-2-614(b) clearly raises a question of law, requiring no instruction.

CHAPTER 10

HOMICIDE

SYNOPSIS

1001. Capital Murder

1001-A. Capital Murder—Associated Felony

1001-AD. Capital Murder—Affirmative Defense

1002. First Degree Murder

1002-A. First Degree Murder and Manslaughter—Associated Felony

1002-AD. First Degree Murder and Manslaughter—Affirmative Defense

1003. Second Degree Murder

1004. Manslaughter

1004-A. Extreme Emotional Disturbance Manslaughter

1005. Negligent Homicide

1005-EXP. Negligent Homicide—Stage One Verdict Explanation—Multiple Possible Verdicts

1005-VF. Negligent Homicide—Stage One Verdict Form—Multiple Possible Verdicts

1006. Felony-Murder: Distinctions

1007. Premeditation and Deliberation—Definition

1008. Capital Murder—Bifurcated Trial—Punishment

Form 1. Aggravating Circumstances

Form 2. Mitigating Circumstances

Form 3. Conclusions

Form 4. Verdict

1009-EXP. Capital Murder: Mitigation Based On Mental Retardation

1009-VF. Capital Murder: Mental Retardation

(Text continued on page 10-3)

AMCI 2d 1001
CAPITAL MURDER

_____ *(Defendant)* is charged with the offense of capital murder. To sustain this charge, the State must prove the following things beyond a reasonable doubt:

(a) [First: That _____ *(defendant)* (acting alone or with one or more other persons) (committed) (or) (attempted to commit) the crime of (terrorism) (rape) (kidnapping) (vehicular piracy) (robbery) (burglary) _____ *(felony violation of the Uniform Controlled Substances Act involving an actual delivery of a controlled substance)* (escape in the first degree) (aggravated residential burglary); and

Second: That in the course of and in furtherance of that (crime) (or) (attempt) (or in immediate flight therefrom), _____ *(defendant)* (or) (a person acting with [him] [her]) caused the death of _____ *(victim)* under circumstances manifesting extreme indifference to the value of human life.]

(b) [First: That _____ *(defendant)* (acting alone or with one or more other persons) (committed) (or) (attempted to commit) arson; and

Second: That in the course of and in furtherance of (or in immediate flight from) the arson, _____ *(defendant)* (or) (a person acting with [him] [her]) caused the death of _____ *(victim)*.]

(c) [First: That _____ *(defendant)* had the premeditated and deliberated purpose of causing the death of a (law enforcement officer) (jailer) (prison official) (firefighter) (judge) (court official) (probation officer) (parole officer) (member of the military) (teacher) (school employee) when such person was acting in the line of duty; and

Second: That with that purpose _____ *(defendant)* caused the death of _____ *(victim)*.]

(d) [That with the premeditated and deliberated purpose of causing the death of another person, _____ *(defendant)* caused the death of _____ *(victim)*.]

(e) [First: That _____ *(defendant)* had the premeditated and deliberated purpose of causing the death of (a holder of any public office filled by election or appointment) (or) (a candidate for public office); and

Second: That with that purpose _____ *(defendant)* caused the death of _____ *(victim)*.]

(f) [First: That _____ *(defendant)*, while incarcerated in the (Department of Correction) (or) (Department of Community Correction), purposely caused the death of _____ *(victim)*; and

Second: That _____ *(defendant)* did so with premeditation and deliberation.]

(g) [First: That _____ *(defendant)* entered into an agreement that (he) (she) would cause the death of another person in return for anything of value; and

Second: That, pursuant to that agreement, _____ *(defendant)* caused the death of _____ *(victim)*.]

(h) [First: That _____ *(defendant)* entered into an agreement whereby _____ *(person or persons hired)* (was) (were) to cause the death of _____ *(person to be killed)* in return for anything of value; and

Second: That the person(s) hired pursuant to that agreement caused the death of _____ *(victim)*.]

(i) [First: Under circumstances manifesting extreme indifference to the value of human life, _____ *(defendant)* knowingly caused the death of _____ *(victim)*, a person (he) (she) knew to be 14 years of age or younger at the time; and

Second: That at the time _____ *(defendant)* was at least 18 years old.]

(j) [First: That _____ *(defendant)* purposely discharged a firearm from a vehicle at a (person) (or) (vehicle) (conveyance) (or) ([residential] [commercial] occupiable structure) that (he) (she) (knew) (or) (had good reason to believe) to be occupied by a person; and

Second: Thereby caused the death of _____ *(victim)* under circumstances manifesting extreme indifference to the value of human life.]

Definitions

"Firearm" — means any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use, including such a device that is not loaded or lacks a clip or other component to render it immediately operable, and components that can readily be assembled into such a device.

"Knowingly." — A person acts knowingly (or with knowledge) with respect of his conduct or the circumstances that exist at the time of his act when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purposely." — A person acts purposely with respect to the results of his conduct when it is his conscious object to cause the results.

NOTE ON USE

Use this instruction in conjunction with AMCI 2d 1008.

In prosecutions under Ark. Code Ann. § 5-10-101, if commission of the underlying felony is in issue or the court thinks it would be helpful to the jury, AMCI 2d 1001-A should be given.

The Court may find it appropriate to define "premeditation and deliberation," "premeditated and deliberated purpose," or "purposely" as used in this instruction. The first two terms are defined in AMCI 2d 1007. The third is defined above.

The felony delivery of a controlled substance requires actual, not constructive, delivery of the controlled substance.

Where the defendant is charged under subsection (i), Ark. Code Ann. § 5-10-101(a)(9) provides an affirmative defense. *See* Comment to AMCI 2d 1001-AD.

COMMENT

Ark. Code Ann. § 5-10-101. Capital murder is a Class Y felony punishable by death or life imprisonment without parole.

This instruction assumes that the "knowing" mental state in Alternative (i) applies to the defendant's awareness of the age of the victim. Ark. Code Ann. § 5-2-203(a).

Ark. Code Ann. § 5-1-110(d)(1) permits separate convictions and sentences for capital felony murder and any underlying felonies.

In the context of capital murder, the supreme court has stated that the phrase "manifesting extreme indifference to the value of human life" indicates that the perpetrator of capital murder must act with deliberate conduct that culminates in the death of some person. *Branstetter v. State,* 346 Ark. 62, 57 S.W.3d 105 (2001); *Flowers v. State,* 342 Ark. 45, 25 S.W.3d 422 (2000); *Sanford v. State,* 331 Ark. 334, 962 S.W.2d 335 (1998); *McGehee v. State,* 328 Ark. 404, 943 S.W.2d 585 (1997); *Davis v. State,* 325 Ark. 96, 925 S.W.2d 768 (1996).

Torres v. State, 2019 Ark. 101. Appellant was convicted of capital murder. He was charged with capital murder under two alternative theories, rape-felony-murder and child-abuse murder. The rape that formed the basis for the felony-murder theory did not occur in Arkansas. Arkansas Code Annotated § 5-1-104 outlines the applicable law for extraterritorial jurisdiction. For purposes of appellant's case, for the statute to apply, the State would have had to establish that either: (1) the rape occurred in Arkansas; or (2) a result that is an element of the rape occurred in Arkansas. The "result" of the rape in appellant's case was the death of the victim, which occurred in Arkansas. However, death is not an element of the offense of rape. Thus, the State failed to establish that the extraterritorial jurisdiction applied, and Arkansas did not have jurisdiction over the conduct alleged to have been rape. Accordingly, there was insufficient evidence to support the rape-felony-murder conviction. Additionally, the error associated with the rape-felony-murder conviction tainted the entire verdict because the jury completed a general verdict form and the appellate court was unable to determine upon which theory of murder the jury based appellant's conviction.

(Text continued on page 10-7)

AMCI 2d 1001-A

CAPITAL MURDER — ASSOCIATED FELONY

As a part of [Count _____ of] **the charge of capital murder, the State contends that the death of** _____ *(victim)* **occurred during the** [commission] [or] [attempted commission] **of the crime of** _____ *(applicable felony)* **by** _____ *(defendant(s))* [or in immediate flight therefrom]. **To prove** _____ *(applicable felony)*, **the State must prove beyond a reasonable doubt:**

[Insert appropriate elements from instruction on applicable felony.]

If the crime of _____ *(applicable felony)* **is not proved to have been** [committed] [or] [attempted] **by** _____ *(defendant(s))*, [he is] [they are] **not guilty** [of] [under this Count of] **capital murder.**

NOTE ON USE

A charge of capital murder committed in the course of one of the felonies specified in Ark. Code Ann. § 5-10-101(a)(1) or (2) will require proof of that felony. This instruction is designed for use in defining the felony if requested by either party or if the court feels that it would be helpful to the jury.

If another count of capital murder is joined with the felony-murder count, the bracketed language in the first and last sentences of the instruction referring to this count should be used.

COMMENT

1995 Ark. Acts 657 amended Ark. Code Ann. § 5-1-110 to permit separate convictions for both (1) capital felony murder, first degree felony murder, and continuing criminal enterprise and (2) any underlying felonies (or predicate felonies in continuing criminal enterprise prosecutions) proved as an element of the murder or criminal enterprise.

AMCI 2d 1001-AD

CAPITAL MURDER — AFFIRMATIVE DEFENSE

_____ *(Defendant(s))* assert[s] an affirmative defense to the charge of capital murder. To establish this affirmative defense, [_____ *(defendant)*] [a defendant] must prove each of the following things:

First: That he was not the only party to the offense;

Second: That he did not commit the homicidal act; and

Third: That he did not in any way solicit, command, induce, procure, counsel, or aid its commission.

_____*(Defendant(s))* [has] [have] the burden of proving this defense by a preponderance of the evidence, unless the defense is so proved by other evidence in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If the evidence with regard to this defense appears to be equally balanced, or if you cannot say upon which side it weighs heavier, then the defense has not been established. If you find that this defense has been established [by (either) (any) defendant] **then you shall find** [that defendant] **[_____ *(defendant)*] not guilty of the offense of capital murder. Whatever may be your finding as to this defense, you are reminded that the State still has the burden of establishing the guilt of [_____ *(defendant)*]** [each defendant] **upon the whole case beyond a reasonable doubt.**

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-10-102. "Knowingly" and "purpose" are defined in Ark. Code Ann. § 5-2-202.

Any felony may support a first degree murder charge; the statute does not require the underlying felony to be one of violence. *Hall v. State*, 299 Ark. 209, 772 S.W.2d 317 (1989).

This instruction assumes the "knowing" mental state in alternative (c) applies to the defendant's awareness of the age of the victim. Ark. Code Ann. §§ 5-2-203(a) and (b); 5-1-111(a)(1); 5-1-102(5).

Murder in the first degree is a Class Y felony.

1995 Ark. Acts 657 amended Ark. Code Ann. § 5-1-110 to permit separate convictions for both (1) capital felony murder, first degree felony murder, and continuing criminal enterprise and (2) any underlying felonies (or predicate felonies in continuing criminal enterprise prosecutions) proved as an element of the murder or criminal enterprise.

AMCI 2d 1002-A

FIRST DEGREE MURDER AND MANSLAUGHTER — ASSOCIATED FELONY

As a part of [Count _____ of] **the** [charge] [lesser included offense] **of** [murder in the first degree] [(and the lesser included offense of) manslaughter], **the State contends that the death of** _____ *(victim)* **occurred during the** [commission] [or] [attempted commission] **by** _____ *(defendant(s))* **of the crime(s) of** _____ *(applicable felony)* [or _____] *(other felony(s)*] [or in immediate flight therefrom].

To prove the crime of _____ *(applicable felony)*, **the State must prove beyond a reasonable doubt:**

[Insert appropriate elements from instruction on applicable felony and repeat this entire paragraph for each felony upon which the court is instructing.]

If the crime of _____ *(applicable felony)* [or _____] *(other felony(s)*] **is not proved to have been** [committed] [or] [attempted] **by** _____ *(defendant(s))*, [he is] [they are] **not guilty** [of] [under this Count of] [murder in the first degree] [or] [manslaughter].

NOTE ON USE

This instruction is the counterpart to AMCI 2d 1001-A, and should be given if requested by counsel or if the court feels that it would be helpful to the jury.

If another count of first degree murder or manslaughter is joined with the felony-murder count, the language at the beginning and end of the instruction referring to this "Count" should be used.

COMMENT

1995 Ark. Acts 657 amended Ark. Code Ann. § 5-1-110 to permit separate convictions for both (1) capital felony murder, first degree felony murder, and continuing criminal enterprise and (2) any underlying felonies (or predicate felonies in continuing criminal enterprise prosecutions) proved as an element of the murder or criminal enterprise.

AMCI 2d 1002-AD

FIRST DEGREE MURDER AND MANSLAUGHTER — AFFIRMATIVE DEFENSE

_____ *(Defendant(s))* **assert(s) an affirmative defense to the** [charge] [lesser included offense] **of** [murder in the first degree] [and] [the lesser included offense of] [manslaughter]. **To establish this affirmative defense,** [he] [a defendant] **must prove each of the following things:**

First: That he was not the only participant in the offense; and

Second: That he did not commit the homicidal act or in any way solicit, command, include, procure, counsel, or aid its commission; and

Third: That he reasonably believed that no other participant intended to engage in conduct which could result in death or serious physical injury;[and]

[Fourth: That he was not armed with a deadly weapon][; and]

[Fourth:] [Fifth:] [That he reasonably believed that no other participant was armed with a deadly weapon].

_____ *(Defendant(s))* [has] [have] **the burden of proving this defense by a preponderance of the evidence [as that term has been explained to you], unless the defense is so proved by other evidence in the case.**

["Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If the evidence with regard to this defense appears to be equally balanced, or if you cannot say upon which side it weighs heavier, then the defense has not been established.]

If you find that this defense has been established [by (either) (any) defendant], **then you shall find** [that defendant] [_____ *(defendant)*]**not guilty of the offense[s] of** [murder in the first degree] [and] [manslaughter]. **Whatever may be your finding as to this defense, you are reminded that the State still has the burden of establishing the guilt of** [_____ *(defendant)*] [each defendant] **upon the whole case beyond a reasonable doubt.**

NOTE ON USE

This instruction is complete in itself and AMCI 2d 601 should not be used.

This affirmative defense is applicable in identical language to prosecutions under Ark. Code Ann. §§ 5-10-102(a)(1) and 5-10-104(a)(4). This instruction may be used when first degree murder or manslaughter, or both, are being submitted to the jury.

When there is only one defendant or when only one of two or more defendants asserts this affirmative defense, use the alternative word "he" in the second sentence of the first paragraph and insert the name of the defendant in the last two sentences of the instruction. Use the alternative bracketed language when two or more assert such a defense.

In the list of elements to be proved, the first, second, and third subparagraphs will ordinarily be given whenever the instruction is used. The fourth or fifth subparagraph, or both, should be given as required by the proof. Use the word "and" before each subparagraph that is given after the first, to indicate that the elements are cumulative. In the paragraph following the elements, the court may find it unnecessary to repeat the bracketed definition of "preponderance of the evidence" if it has already been given, in which case the preceding bracketed clause should be used.

COMMENT

Ark. Code Ann. §§ 5-10-102(b) and -104(b).

Defendant claimed that trial court erred in giving this instruction because it was impossible for defendant to meet his burden of proof given the fact that he knew that his codefendant was armed. Error, if any, was harmless since defendant was convicted of capital murder after the trial court instructed the jury not to consider the charge of first degree murder unless it had a reasonable doubt of defendant's guilt on capital murder and not to consider this affirmative defense unless it determined that defendant was guilty of first degree murder. *Jackson v. State,* 2004 WL 2249531 (October 7, 2004).

AMCI 2d 1003

SECOND DEGREE MURDER

(Defendant(s)) [is] [are] **charged with the offense of murder in the second degree. To sustain this charge the State must prove beyond a reasonable doubt that:**

(a) [_____ *(Defendant(s))* knowingly caused the death of _____*(victim)* under circumstances manifesting extreme indifference to the value of human life.]

(b) [_____ *(Defendant(s))*, with the purpose of causing serious physical injury to (_____ *(victim))* (_____ *(another person))*, caused the death of _____ *(victim).*]

Definitions

"Knowingly." — A person acts knowingly (or with knowledge) with respect to his conduct or the circumstances that exist at the time of his act when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purpose." — A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Serious physical injury." — means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-10-103. "Knowingly" and "purpose" are defined in Ark. Code Ann. § 5-2-202. "Serious physical injury" is defined in Ark. Code Ann. § 5-1-102.

Murder in the second degree is a Class-A-felony.

In *Green v. State,* 330 Ark. 458, 956 S.W.2d 849 (1997), the defendant was charged with first degree murder and attempted capital murder after shooting two police officers attempting to execute a search warrant at his apartment. The defendant testified that he believed the intruders to be robbers, that he did not intend to shoot anyone, and that he only hoped to scare the intruders away. The State sought and received a second degree murder instruction requiring proof that the defendant had knowingly caused the death of the victim "under circumstances manifesting extreme indifference to the value of human life." The defendant asked for an instruction based on the alternative language of AMCI 2d 1003 — i.e., with the purpose of causing serious physical injury to the victim, he caused the death of the victim. On appeal, the Supreme Court ruled that in view of the defendant's theory of the case, the trial court did not err in refusing to give the instruction sought by the defendant.

The defendant in *Atkinson v. State,* 347 Ark. 336, 64 S.W.3d 259 (2002), was convicted as an accomplice to first degree murder after the shooter testified that defendant had asked him to kill the victim. The shooter also testified that he decided to kill the victim only seconds before the murder occurred after the victim threw sand in the shooter's eyes. The trial court refused to instruct the jury on second degree murder, and the supreme court affirmed based on the shooter's testimony that defendant had asked him numerous times to kill the victim and that he would not have killed the victim but for the defendant's requests.

In *McCoy v. State,* 347 Ark. 913, 69 S.W.3d 430 (2002), second-degree murder under Ark. Code Ann. § 5-10-103(a)(1) was determined to be a lesser-included offense of first-degree murder under Ark. Code Ann. § 5-10-102(a)(2). The definition of "purposely" encompasses the culpable mental state of acting knowingly with extreme indifference, which requires deliberate conduct with a knowledge or awareness that one's actions are practically certain to bring about the prohibited result. The combination of knowledge and extreme indifference requires proof that the defendant acted with more than mere knowledge, but less than purposeful intent.

Second-degree murder is a lesser-included offense of first-degree murder because it differs from the greater offense only to the extent that it requires a lesser kind of culpable mental state.

In *Burley v. State,* 348 Ark. 422, 73 S.W.3d 600 (2002), a caregiver was convicted of second degree murder after she forcefully inserted the cap of a rectal thermometer into the rectum of a 18 month old child. On appeal, the court held that there was sufficient evidence to support a jury finding that the defendant knowingly caused the death of the infant under circumstances manifesting extreme indifference to the value of human life.

For a defendant to be entitled to an instruction on the lesser-included offense of second-degree murder, there must be evidence that he acted with a knowing mental state rather than a purposeful mental state (e.g., he knowingly shot at the vehicle without aiming at the victim). *Morris v. State,* 351 Ark 426, 94 S.W.3d 913 (2003).

"[I]t is not error for the court to refuse or fail to instruct on the lesser offense where the evidence clearly shows that the defendant is either guilty of the greater offense charged or innocent." *Davis v. State*, 2009 Ark. 478, 348 S.W.3d 553, *citing Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000).

AMCI 2d 1004
MANSLAUGHTER

_____ *(Defendant(s))* [is] [are] **charged with the offense of manslaughter. To sustain this charge the State must prove beyond a reasonable doubt that:**

(a) [_____ *(Defendant(s))* caused the death of _____ *(victim)* under circumstances that would be murder, except that (he) (they) caused the death under the influence of extreme emotional disturbance for which there was a reasonable excuse. You should determine the reasonableness of the excuse from the viewpoint of a person in _____'s *(defendant(s))* situation under the circumstances as (he) (they) believed them to be.]

(b) [_____ *(Defendant(s))* purposely caused or aided _____ *(victim)* to commit suicide.]

(c) [_____ *(Defendant(s))* recklessly caused the death of _____ *(victim).*]

(d) [(Acting alone or with one or more persons) _____ *(Defendant(s))* (committed) (or) (attempted to commit) _____ *(applicable felony)*, and in the course of and in furtherance of that crime (or in immediate flight therefrom):

(1) ([He] [they] [or] [a person acting with (him) (them) (defendant[s])] negligently caused the death of _____ *(victim)* (or)

(2) Another person who was resisting the offense [or flight] caused the death of _____ *(victim).*)]

(The term "negligently," as used in this criminal case means more than it does in civil cases. To prove negligence in a criminal case the state must show that _____ *(defendant(s))* should have been aware of a substantial and unjustifiable risk that the death would occur. The risk must have been of such a nature and degree that _____'s *(defendant)* failure to perceive it, considering the nature and purpose of [his] [their] conduct and the circumstances known to [him] [them], involved a gross deviation from the standard of care that a reasonable person would have observed in [his] [their] situation.)

Definitions

"Purposely."—A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Recklessly."—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard

thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation.

NOTE ON USE

The bracketed paragraph (a) would ordinarily be used where the offense is a lesser included offense to a murder charge. If it is actually the charged offense and it is determined by the court that the circumstances which would be murder should be explained, the appropriate portions of AMCI 2d 1001, 1002, and 1003 should be used.

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-10-104. "Purposely," "recklessly," and "negligently" are defined in Ark. Code Ann. § 5-2-202.

An unborn viable fetus is not a "person" as that term is used in the manslaughter statute. *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987).

Manslaughter is a Class C felony.

The defendant in *Ellis v. State,* 345 Ark. 415, 47 S.W.3d 259 (2001), argued that reckless manslaughter was a lesser-included offense of first or second-degree murder. On appeal, the supreme court ruled that the victim's refusal to stop staring at defendant was not an excuse for extreme emotional disturbance so great as to entitle defendant to a manslaughter instruction. Nor did the fact that defendant shot the victim only once from a distance of three to five feet show that his mental state was reckless rather than purposeful.

The defendant in *State v. Hulum,* 349 Ark. 400, 78 S.W.3d 111 (2002), was charged with capital murder. He presented a defense of mental disease or defect (AMCI 2d 609), but defense counsel persuaded the trial court to give a manslaughter instruction by arguing that the mental disease or defect testimony also supported a finding that the defendant caused the death "under the influence of extreme emotional disturbance for which there was a reasonable excuse." The jury convicted the defendant of manslaughter, and the state took an appeal under Ark. R. App. P.-Crim 3. The supreme court refused to consider the state's appeal which, according to the court, raised mixed questions of fact and law that made it an inappropriate candidate for appeal under Ark. R. App. P.-Crim 3. A strong dissent argued that the supreme court should have considered the state's appeal and should have declared that evidence of mental disease or defect does not entitle defendant to a manslaughter instruction.

In *Morris v. State,* 351 Ark 426, 94 S.W.3d 913 (2003), the defendant's alleged fear of being shot, standing alone without other supporting evidence, was not sufficient to form a reckless belief that a lethal threat existed to support manslaughter as a lesser-included offense to first-degree murder.

There was no rational basis for instructing the jury on the offense of reckless

manslaughter where the evidence was that defendant fired a gun four times into a stopped vehicle that she knew was occupied. *Bankston v. State*, 361 Ark. 123, 205 S.W.3d 138 (2005).

"In order for a jury to be instructed on extreme-emotional-disturbance manslaughter, there must be evidence that the defendant killed the victim in the moment following some kind of provocation." *Boyle v. State*, 363 Ark. 356, 214 S.W.3rd 250 (2005); *Taylor v. State*, 2009 Ark. App. 627, 331 S.W.3d 597.

"An instruction on manslaughter is not appropriate in the absence of any proof of provocation from the victim." *Mackool v. State*, 363 Ark. 295, 213 S.W. 3d 618 (2005).

The circuit court did not abuse its discretion in refusing to submit a manslaughter instruction to the jury where there was no evidence that the victim possessed a gun and the only evidence of a threat by the victim was the defendant's self-serving testimony. *Pollard v. State*, 2009 Ark. 434, 336 S.W.3d 866.

The trial court did not err in refusing to give AMCI 2d 1004 as a lesser-included offense instruction where the evidence was that defendant traveled from Colorado to Arkansas, shot his ex-wife, returned to Colorado, and disposed of the murder weapon along the way. *Jones v. State*, 2012 Ark. 38, 388 S.W. 3d 411 (2012).

Evidence was presented to establish that at least forty gunshots were fired at a trailer that was believed to have people inside. The appellate court explained that such actions are considered to be beyond a gross deviation of the standard of care that a reasonable person would observe and would be considered deliberate actions and not reckless. *Chavez v. State*, 2018 Ark. App. 527 Thus, there was no rational basis for giving an instruction for reckless manslaughter, and the trial court did not abuse its discretion in refusing to give the instruction. *Id.*

Based on appellant's claim of innocence, there was no rational basis to instruct the jury on manslaughter as a lesser-included offense of capital murder or first-degree murder. *Crift v. State*, 2018 Ark. App. 15.

AMCI 2d 1004-A
EXTREME EMOTIONAL DISTURBANCE MANSLAUGHTER

The law provides that if a person commits the offense of murder, but does so under the influence of extreme emotional disturbance for which there is reasonable excuse, that person has committed the offense of manslaughter rather than murder. You must determine reasonableness from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be.

(*Defendant*), in asserting the defense of extreme emotional disturbance, is required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to his guilt of murder rather than manslaughter, you may find him guilty only of manslaughter.

Whatever may be your finding as to this defense, you are reminded that the State still has the burden of establishing the guilt of (*defendant*) upon the whole case beyond a reasonable doubt.

NOTE ON USE

This instruction is used with AMCI 2d 1004 when the defendant is asserting the defense of extreme emotional disturbance. Use AMCI 2d 301 and 302 with the bracketed language for extreme emotional disturbance manslaughter with the instructions for the murder offense(s) being submitted, then this instruction, followed by AMCI 2d 1004.

COMMENT

Ark. Code Ann. § 5-10-104. This instruction was added in 2013 in response to the case *Fincham v. State*, 2013 Ark. 204.

In order for a jury to be instructed on extreme-emotional-disturbance manslaughter, there must be evidence that the defendant killed the victim in the moment following some kind of provocation, such as "physical fighting, a threat, or a brandished weapon." Passion alone will not reduce a homicide from murder to manslaughter. *Boyle v. State*, 363 Ark. 356, 362, 214 S.W.3d 250, 253 (2005); *Taylor v. State*, 2009 Ark. App. 627, 331 S.W.3d 597.

In *Ellis v. State*, 345 Ark. 415, 47 S.W.3d 259 (2001), the Supreme Court ruled that the victim's refusal to stop staring at defendant was not an excuse for extreme emotional disturbance so great as to entitle defendant to a manslaughter instruction.

The defendant in *State v. Hulum*, 349 Ark. 400, 78 S.W.3d 111 (2002), was charged with capital murder. He presented a defense of mental disease or defect (AMCI 2d 609), but defense counsel persuaded the trial court to give a manslaughter instruction by arguing that the mental disease or defect testimony also supported a finding that the defendant caused the death "under the influence of extreme emotional disturbance for which there was a reasonable excuse." The jury convicted the defendant of manslaughter, and the state took an appeal under

Ark. R. App. P.-Crim. 3. The Supreme Court refused to consider the state's appeal which, according to the court, raised mixed questions of fact and law that made it an inappropriate candidate for appeal under Ark. R. App. P.-Crim. 3. A strong dissent argued that the Supreme Court should have considered the state's appeal and should have declared that evidence of mental disease or defect does not entitle defendant to a manslaughter instruction.

The facts involved defendant killing "an innocent bystander," who had not provoked or threatened him, demonstrated that there was no rational basis for giving an extreme emotional disturbance manslaughter instruction to the jury. *Williams v. State*, 2015 Ark. App. 262.

Mere threats or menaces are insufficient provocation when the person killed was not armed and was not committing acts of violence against the defendant. *Cody v. State*, 2014 Ark. App. 686, 449 S.W.3d 712; *Davis v. State*, 2015 Ark. 284.

A defendant is not entitled to an instruction on extreme-emotional-disturbance manslaughter unless there is a factual basis showing that the defendant killed the victim in the moment following provocation in the form of physical fighting, a threat, or a brandished weapon. There was no factual basis for defendant to establish that his victim, who attempted to confiscate his shoes, provoked him. *Johnson v. State*, 2016 Ark. 156.

In order for a jury to be instructed on extreme-emotional-disturbance manslaughter, there must be evidence that the defendant killed the victim in the moment following some kind of provocation, such as physical fighting, a threat, or a brandished weapon. Passion alone will not reduce a homicide from murder to manslaughter. In defendant's case, he had an argument with his wife then traveled to his ex-wife's house and killed her. There was no evidence that the ex-wife provoked the situation. Although defendant's marital problems may have "aroused unbalanced passions," the instruction required proof of provocation. Thus, the trial court did not abuse its discretion when it refused to instruct the jury on manslaughter. *Johnson v. State*, 2017 Ark. App. 373.

There was no rational basis for the trial court to instruct the jury on negligent homicide or imperfect self-defense. *Schnarr v. State*, 2017 Ark. 10.

A jury instruction on extreme-emotional-disturbance manslaughter requires evidence that the defendant killed the victim following provocation such as physical fighting, a threat, or a brandished weapon. *Crews v. State*, 2017 Ark. App. 670. The passion that will reduce a homicide from murder to manslaughter may consist of anger or sudden resentment, or of fear or terror; but the passion springing from any of these causes will not alone reduce the grade of the homicide. There must also be a provocation which induced the passion, and which the law deems adequate to make the passion irresistible. An assault with violence upon another who acts under the influence thereof may be sufficient to arouse such passion. Mere threats or menaces, where the person killed was unarmed and neither committing nor attempting to commit violence on the defendant at the time of the killing, will not free him of the guilt of murder. In appellant's case, a

weapon was not found on the alleged aggressor/victim or at the crime scene and the only evidence of alleged provocation was the uncorroborated, self-serving testimony of the appellant. Thus, there was no evidence of provocation that would have warranted an extreme-emotional-disturbance manslaughter instruction. *Crews v. State*, 2017 Ark. App. 670.

(Text continued on page 10-27)

AMCI 2d 1005
NEGLIGENT HOMICIDE

_____ (Defendant) **is charged with the offense of negligent homicide. To sustain this charge the State must prove beyond a reasonable doubt that:**

[_____ (Defendant) negligently caused the death of _____ (victim) as a result of operating (a vehicle) (an aircraft) (a watercraft)

(while intoxicated) (or)

(while there was an alcohol concentration of 0.08 or more in _____ (defendant's) (breath) (or) (blood) as determined by a chemical test of the _____ (defendant's) (blood) (urine) (breath) (saliva) (or) (other bodily substance)) (or)

(while passing a school bus that was stopped and displaying its alternating red warning lights for the purpose of loading or unloading passengers)

[or]

(while fatigued).]

[_____ (Defendant) negligently caused the death of _____ (victim).]

[The term "negligently" as used in this criminal case means more than it does in civil cases. To prove negligence in a criminal case the State must show beyond a reasonable doubt that _____ (defendant) should have been aware of a substantial and unjustifiable risk that the death would occur. The risk must have been of such a nature and degree that his failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involved a gross deviation from the standard of care that a reasonable person would have observed in his situation.]

[To prove that _____ (defendant) was "intoxicated" the State must show beyond a reasonable doubt that _____ (defendant) was (influenced) (or) (affected) by (alcohol) (or) (_____) (drug) (a controlled substance) (or) (_____) (any other intoxicant) (or any combination of them) to such a degree that his reactions, motor skills, and judgment were substantially altered, and his conduct posed a clear and substantial danger of (physical injury) (or) (death) to himself or another person.]

The term "fatigued" as used in this criminal case means having been without sleep for a period of 24 consecutive hours or having been without sleep for a period of 24 consecutive hours and in the state of being asleep.

Definitions

"Alcohol concentration" means (grams of alcohol per one hundred (100)

milliliters, or cubic centimeters, of blood) (or) (grams of alcohol per two hundred ten (210) liters of breath). (The alcohol concentration of urine, saliva, or other bodily substances shall be based upon grams of alcohol per one hundred (100) milliliters, or cubic centimeters, of blood, the same being percent weight per volume or percent alcohol concentration.)

"Chemical test."—A chemical test is one that analyzes a person's [blood] [urine] [saliva] [breath] [or] [other bodily substance] for determining the alcohol content in the blood or breath. The test and the methods by which it is performed must be approved by the Arkansas State Department of Health, or the test must be made by the State Crime Laboratory or be given by a person possessing a valid permit to administer it.

NOTE ON USE

The term "negligently" must be defined in every case, and the term "intoxication" must be defined in every case where intoxication is charged. If these definitions have been given in an earlier instruction, they need not be repeated in the AMCI 2d 1005 instruction. In most cases there will be a rational basis for a conviction of only one form of negligent homicide, and instructions from AMCI 2d Chapters 81 and 83 should be used in Stage One. If the evidence affords the jury a rational basis for selecting a verdict of guilt from alternative charges of negligent homicide, use AMCI 2d 1005-EXP and 1005-VF.

Ark. Code Ann. § 5-10-105 (a)(1)(c) involves the commission of negligent homicide while passing a stopped school bus in violation of Ark. Code Ann. § 27-51-1004. Depending upon the facts of the case, that statute and § 27-51-1005 (operation on a multiple lane highway) should be reviewed to determine if this instruction may need to be modified.

COMMENT

Ark. Code Ann. § 5-10-105. "Negligently" is defined in Ark. Code Ann.§ 5-2-202. "Intoxicated" is defined in Ark Code Ann. § 5-10-105(c). "Alcohol concentration" is defined in Ark Code Ann. § 5-65-204(a). The definition of "chemical test" is based on language in Ark. Code Ann. § 5-65-204.

Negligent homicide produced by intoxication and by passing a school bus are Class B felonies; otherwise, it is a Class A misdemeanor.

The trial court did not err in refusing to give AMCI 2d 1005 as a lesser-included offense instruction where the evidence was that defendant traveled from Colorado to Arkansas, shot his ex-wife, returned to Colorado, and disposed of the murder weapon along the way. *Jones v. State*, 2012 Ark. 38.

Based upon appellant's testimony that he reached under his car seat, chambered a round in the gun, and intentionally fired the weapon directly at the victim's chest, there was no rational basis for giving the lesser-included jury instruction for the offense of negligent homicide. *Bennett v. State*, 2014 Ark. App. 624, 447 S.W.3d 602.

Appellant was convicted of negligent homicide. The evidence established that

after he stopped at a stop sign, appellant inexplicably failed to see another driver's vehicle; he then proceeded through the stop sign onto a highway and collided with another vehicle, killing the driver. The evidence did not show that appellant was speeding, that he was driving erratically, that he was under the influence of alcohol, that he was using a phone, or that he was engaged in some similar conduct. The Supreme Court concluded that the evidence fell short of criminal negligence. Appellant's actions did not "demonstrate a gross deviation from the standard of care that a reasonable person would observe in the actor's situation considering the nature and purpose of the actor's conduct and the circumstances known to the actor." *Gill v. State*, 2015 Ark. 421.

(Text continued on page 10-29)

AMCI 2d 1005-EXP

NEGLIGENT HOMICIDE — STAGE ONE VERDICT EXPLANATION — MULTIPLE POSSIBLE VERDICTS

If you find _____ *(defendant(s))* guilty of negligent homicide, you will so indicate on the verdict form provided you. You will also make a finding about the circumstances of the offense, as requested on the form.

If you reach a verdict of not guilty, you will indicate this on the form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1005 and 1005-VF where the evidence affords the jury a rational basis for selecting one verdict from the alternatives set out in AMCI 2d 1005-VF. In other cases, use AMCI 2d 1005 in conjunction with AMCI 2d 8101 and 8301-VF.

AMCI 2d 1005-VF

NEGLIGENT HOMICIDE — STAGE ONE VERDICT FORM — MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* **is guilty of negligently causing the death of** _____ *(victim)*.

_____

FOREMAN

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* **is guilty of negligently causing the death of** _____ *(victim)* **as a result of operating** (a vehicle) (an aircraft) (a watercraft) (while intoxicated) (or) (while there was an alcohol concentration of 0.08 or more in _____ *(defendant's)* (breath) (or) (blood)).

_____

FOREMAN

We, the Jury, find _____ *(defendant)* **not guilty.**

_____

FOREMAN

NOTE ON USE

This verdict form should be used only in conjunction with AMCI 2d 1005-EXP.

If a verdict of guilty is returned, the appropriate standard punishment instruction and verdict form should be used in Stage Two.

AMCI 2d 1006

FELONY-MURDER: DISTINCTIONS

[When a death occurs during the (commission) (or) (attempted commission) of another crime (or in immediate flight therefrom), capital murder is proved only if that other crime constituted _____ *(specific felony)* and all other elements of capital murder are proved. Murder in the first degree is (also) proved if the other crime (committed) (or) (attempted) constituted _____ (or_____) (or_____) and all other elements of murder in the first degree are proved.]

[The difference between murder in the first degree and manslaughter is that in murder in the first degree the death of _____ *(victim)* must have been caused under circumstances manifesting extreme indifference to human life, but in manslaughter the death of _____ *(victim)* must have been caused "negligently" (as that term has been defined for you). Of course, all other elements of either crime must be proved, but the difference between them is what I have just explained.]

NOTE ON USE

These instructions should be used when the subject offenses are being submitted to the jury in a case involving a homicide which occurred during the alleged commission or attempted commission of another crime. The first bracketed paragraph should be given immediately following the definition of first degree murder. The second bracketed paragraph should be given immediately following the definition of manslaughter, but it would not be applicable and should not be given if the jury could reasonably find that the basis of guilt was a killing by a person resisting the crime or flight therefrom under Ark. Code Ann. § 5-10-104(a)(4)(B).

The decision as to the use of the word "also" in the first bracketed paragraph will depend upon the statutory construction made by the court as explained in the Comment to this instruction.

The parenthetical clause in the second paragraph should be given only if the court has defined the term "negligently" in its manslaughter instruction.

COMMENT

Compare Ark. Code Ann. §§ 5-10-101(a)(1)-(2); -102(a)(1); and -104(a)(4).

The jury is expressly permitted to find guilt of first degree murder even if the associated crime committed or attempted was one of the felonies specifically named in the capital murder statute. *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980). It may be error not to insert in the instruction on first degree murder the specific underlying felony included in the capital murder charge. *See Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200, 203–204 (1981).

The supreme court reversed a felony murder conviction in *Craig v. State,* 70 Ark. App. 71, 14 S.W.3d 893 (2000), because the defendant beat the victim "in furtherance of the homicide, not in furtherance of committing an independent felony." *Craig v. State,* 70 Ark. App. 80, 14 S.W.3d 893 (2000).

AMCI 2d 1007

PREMEDITATION AND DELIBERATION — DEFINITION

In order to find that _____ *(defendant(s))* **acted with** [a premeditated and deliberated purpose] [premeditation and deliberation], **you must find that** [he] [they] **had the conscious object to cause death and that** [he] [they] **formed that intention before acting, as result of a weighing in the mind of the consequences of a course of conduct as distinguished from acting upon sudden impulse without the exercise of reasoning powers.**

It is not necessary that this state of mind existed for any particular length of time, but it is necessary that it was formed before the homicidal act was committed.

NOTE ON USE

The first bracketed term is used in Ark. Code Ann. § 5-10-101(a)(3)-(5), dealing with causing the death of any person with the intent to kill a person in specifically designated categories, such as law enforcement officers. The second bracketed term is used in Ark. Code Ann. § 5-10-101(a)(6) and will only be used when the intended victim was allegedly killed by a person under sentence of life imprisonment, life imprisonment without parole, or death.

COMMENT

Davis v. State, 251 Ark. 771, 475 S.W.2d 155 (1972); *Weldon v. State*, 168 Ark. 534, 270 S.W. 968 (1925); *Ferguson v. State*, 92 Ark. 120, 122 S.W. 236 (1909); *Green v. State*, 51 Ark. 189, 10 S.W. 266 (1889).

The Commentary to Ark. Code Ann. § 5-10-101 makes it clear that prior law as to the meaning of these particular terms remains in force. As mentioned in the Note on Use to this instruction, except in one instance the new statutory term is "premeditated and deliberated purpose." The term "purpose" in this context would mean that the defendant had the "conscious object" to cause death. (Ark. Code Ann. § 5-2-202.) This concept has been included in this definition and is entirely consistent with the historical definition of "premeditation". There is, therefore, no need to submit separate definitions of the terms "premeditation and deliberation" and "premeditated and deliberated purpose."

AMCI 2d 1008

CAPITAL MURDER — BIFURCATED TRIAL — PUNISHMENT

Members of the Jury, you have found _____ (defendant(s)) **guilty of capital murder. After hearing arguments of counsel, you will again retire to deliberate and decide** [separately as to each defendant] **whether** [he] [she] **is to be sentenced to death by lethal injection or to life imprisonment without parole.**

In determining which sentence shall be imposed, you are required to make specific written findings as to the existence or absence of aggravating and mitigating circumstances. Appropriate forms will be provided for you, and I will now instruct you on the procedures that you must follow.

[The instructions I will now give you apply to each of the defendants individually. You will be given a complete set of forms for each defendant. Your verdict may or may not be the same for each defendant, but you must consider the case of each one separately.]

[As to each defendant] **there are three forms for you to use in reaching your decision, and a verdict form for you to use when your verdict has been reached.**

Form 1, which will be handed to you later, deals with aggravating circumstances. The appearance of any particular aggravating circumstance on the form does not mean that it actually existed in this case. These are specified by law and are the only aggravating circumstances that you may consider. The State has the burden of proving beyond a reasonable doubt one or more of the listed aggravating circumstances. If you find unanimously and beyond a reasonable doubt that the State has proved one or more of these aggravating circumstances, then you will indicate your findings by checking the appropriate space on Form 1. If you do not unanimously find beyond a reasonable doubt the existence of any aggravating circumstance, then you will cease deliberations and indicate on the verdict form a sentence of life imprisonment without parole.

If you do unanimously find one or more aggravating circumstances, you should then complete Form 2, which deals with mitigating circumstances. Form 2 lists some factors that you may consider as mitigating circumstances. However, you are not limited to this list. You may, in your discretion, find other mitigating circumstances.

Unlike an aggravating circumstance, you are not required to be convinced of the existence of a mitigating circumstance beyond a reasonable doubt. A mitigating circumstance is shown if you believe from the evidence that it probably exists.

With respect to each mitigating circumstance listed on Form 2 you should indicate by placing a check mark in the appropriate space the number of jurors who believe that the circumstance probably exists. By checking the first space under a circumstance, you indicate that all members of the jury find that the circumstance probably exists. By checking the second space under a circumstance, you indicate that at least one, but not all members of the jury find that the circumstance probably exists. By checking the third space under a circumstance, you indicate that no member of the jury finds that the circumstance probably exists.

You may use the blank lines under "Other mitigating circumstances" to list any other mitigating circumstances that all or at least one juror finds probably exists.

After making the determinations required to complete Form 1 and Form 2, if applicable, you will then complete Form 3.

In no event will you return a verdict imposing the death penalty unless you unanimously make three particular written findings on Form 3. These are:

> **First: That the State has proved beyond a reasonable doubt one or more aggravating circumstances.**
>
> **Second: That such aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances any of you found to exist; and**
>
> **Third: That the aggravating circumstances justify beyond a reasonable doubt the sentence of death.**

If you make those findings, you will impose the death penalty. Otherwise, you will sentence the [particular] defendant to life imprisonment without parole.

After you have made your determinations on Forms 1 and 2 and have reflected your conclusions on Form 3, then you must check the appropriate verdict on Form 4. Each of you must sign [the] [each] **verdict form.**

You may now retire to consider your decision.

NOTE ON USE

Persons under sentence of death or life imprisonment without parole are not eligible for transfer from the Department of Correction to the Department of Community Punishment. Upon request by a party, the trial court should instruct the jury to this effect.

If more than one defendant is found guilty of capital murder, the appropriate bracketed matter should be used. A complete set of forms must be prepared and submitted for each defendant. To avoid confusion, each form should have the name of the defendant to whom it applies inserted at the top of the form in a conspicuous place.

The court should not submit any aggravating or mitigating circumstances that are completely unsupported by any evidence.

When instructing the jury on aggravating or mitigating circumstances the trial court should only provide instructions where there is some evidence to support a finding of a particular circumstance. For example, if there is no evidence that the defendant, at the time of the homicide, was imprisoned as a result of a felony conviction, then that should not be submitted as an aggravating circumstance to the jury. *Duncan v. State*, 291 Ark. 521, 726 S.W.2d 653 (1987); *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980).

Although aggravating circumstances are limited to the nine factors listed in the statute, mitigating circumstances can include factors other than those listed in the statute. Ark. Code Ann. §§ 5-4-604 and -605. The defendant may submit proper instructions as to mitigating circumstances not listed in the statute if: (1) there is some evidence to support such an instruction; (2) the instruction is drafted in the format set forth below.

COMMENT

Ark. Code Ann. §§ 5-4-602 through -605. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980).

(Text continued on page 10–41)

FORM 1

AGGRAVATING CIRCUMSTANCES

We, the Jury, after careful deliberation, have unanimously determined that the State has proved beyond a reasonable doubt the following aggravating circumstance or circumstances:

[( ) At the time of the capital murder _____ *(defendant)* was imprisoned as a result of a felony conviction.]

[( ) At the time of the capital murder _____ *(defendant)* was unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction.]

[( ) _____ *(Defendant)* previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.]

[( ) In the commission of the capital murder, _____ *(defendant)* knowingly created a great risk of death to a person other than the victim.]

[(In the commission of the capital murder, _____ *(defendant)* knowingly caused the death of (more than one person) (_____) *(identities of persons killed)* in the same criminal episode.]

[( )The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody.]

[( ) The capital murder was committed for pecuniary gain.]

[( ) The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any governmental or political function.]

[( ) The capital murder was committed in an especially cruel or depraved manner.

A capital murder is committed in an especially cruel manner when, as a part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, mental anguish, serious physical abuse or torture is inflicted. Mental anguish is defined as the victim's uncertainty as to his ultimate fate. Serious physical abuse is defined as physical abuse that creates a substantial risk of death or that causes protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ. Torture is defined as the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.

A capital murder is committed in an especially depraved manner when the defendant relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder.]

[( ) The capital murder was committed by means of a (destructive device) (bomb) (explosive) (or) (_____) *(similar device)* which the _____ *(defendant)* (planted) (hid) (or) (concealed) in any (place) (area) (dwelling) (building) (or) (structure) (or) (mailed) (or) (delivered) (or caused to be (planted) (hidden) (concealed) (mailed) (or) (delivered)) and the person knew that his act (or acts) would create a great risk of death to human life.]

[( ) The capital murder was committed against a victim whom the defendant knew or reasonably should have known was especially vulnerable to the attack because (of either a temporary or permanent severe physical or mental disability which would interfere with the victim's ability to flee or defend himself) (or) (the victim was 12 years of age or younger).]

_____

FOREMAN

NOTE ON USE

Only one aggravating circumstance need be found to justify a death sentence. *Dansby v. State*, 319 Ark. 506, 524, 893 S.W.2d 331, 341 (1995).

The aggravating circumstance that the offense was committed by a person previously convicted of a prior violent crime should not be used if the offense used is simply a prior burglary. *Sellers v. State*, 295 Ark. 489, 749 S.W.2d 669 (1988). While a burglary could involve the use or threat of violence to another person that created a substantial risk of death or serious physical injury, absent any information except the conviction of the offense, the aggravating circumstance should not be submitted to the jury. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, *cert. denied*, 459 U.S. 1022 (1982).

To prove the previous-violent-felony aggravating circumstance based on an offense committed before the capital murder, the State need only prove beyond a reasonable doubt that the violent felony was *committed*. Proof of *conviction* is not required. *Miller v. State*, 280 Ark. 551, 554 (1983); *Clines v. State*, 280 Ark. 77 (1983). A violent felony committed *after* the capital murder at issue can be used as an aggravating circumstance if the defendant has been convicted of this felony prior to the sentencing hearing in the capital murder trial. *Sanders v. State*, 317 Ark. 328 (1994).

It is not necessary that the defendant was convicted of a prior violent crime, merely that the crime was committed. *Miller v. State,*280 Ark. 551, 660 S.W.2d 163 (1983).

The facts of the case will determine the appropriateness of including the aggravating circumstance that a risk of death to another person was created. For example, even if the defendant did not overtly attempt to injure another person, it is sufficient if the other persons were in the line of fire of the defendant's gun. *Swindler v. State,* 264 Ark. 107, 569 S.W.2d 120 (1978), *cert. denied*, 449 U.S. 1057 (1982).

The avoiding arrest aggravating circumstance is appropriate if the facts of the case suggest that the defendant killed his victim merely to avoid detection. *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986); *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983); *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348 (1991).

The use of the pecuniary gain aggravating circumstance does not constitute "double counting," when the allegation is that the capital murder occurred during a robbery. *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546 (1988); *O'Rourke v. State,* 295 Ark. 57, 746 S.W.2d 52 (1988); *Simpson v. State,* 339 Ark. 467, 6 S.W. 3d 104 (1999).

The statute lists as an aggravating circumstance that the murder was committed in "an especially cruel or depraved manner." This language

is very similar to "an especially heinous, atrocious, or cruel manner." Previous Ark. Code Ann. § 5-4-604(8), ruled unconstitutional in *Wilson v. State*, 295 Ark. 682, 751 S.W.2d 734 (1988); *see also Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 185 (1988). Because Act 683 of 1991 includes definitions of an "especially cruel or depraved manner," it may avoid the constitutional infirmities pointed out in *Wilson*.

Following *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684, *cert. denied*, 465 U.S. 1051 (1984), the Arkansas Supreme Court has held that "[i]f there is evidence of an aggravating or mitigating circumstance, *however slight*, it is sufficient to submit that issue to the jury." *Dansby v. State*, 319 Ark. 506, 524, 893 S.W.2d 331, 341, (1995) [emphasis added].

In *Jones v. State*, 340 Ark. 1, 8 S.W.3d 482 (2000), the prosecution offered evidence during the guilt phase that the defendant committed murder with premeditation and deliberation and during the sentencing phase that defendant committed murder for pecuniary gain and to avoid arrest. The court rejected the defendant's argument that pursuing inconsistent theories during the guilt and sentencing phases violated due process.

In *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000), the prosecution proved that defendant had committed three prior violent felonies. On appeal, the court upheld the trial court's instruction that the jury could find an aggravating circumstance existed for each of the three felonies. It concluded that whether the felonies constituted three aggravating circumstances or only one aggravating circumstance was of no consequence because the jury was still able to consider the existence of three prior felony convictions.

It is not sufficient for the State to prove that the defendant committed a violent crime in another jurisdiction. The State must also show that the crime was a felony under the laws of that jurisdiction. This the State can do by introducing statutes from the other jurisdiction or by requesting the trial court to take judicial notice that the crimes are felonies under the laws of the other jurisdiction. In the absence of either, the jury has no basis for finding that the defendant has previously committed a prior violent felony. Moreover, on appeal the Supreme Court will not take judicial notice that the crime previously committed by the defendant was a felony. *Greene v. State*, 335 Ark. 1, 997 S.W.2d 192 (1998).

Form 2

MITIGATING CIRCUMSTANCES

For each of the following mitigating circumstances, you should place a checkmark in the appropriate space to indicate the number of jurors who find that the mitigating circumstance probably exists.

[The capital murder was committed while (defendant) was under extreme mental or emotional disturbance.

Check one of the following:

_____ All members of the jury find that this circumstance probably exists.

_____ At least one, but not all members of the jury find that this circumstance probably exists.

_____ No member of the jury finds that this circumstance probably exists.]

[The capital murder was committed while (defendant) was acting under unusual pressures or influences or under the domination of another person.

Check one of the following:

_____ All members of the jury find that this circumstance probably exists.

_____ At least one, but not all members of the jury find that this circumstance probably exists.

_____ No member of the jury finds that this circumstance probably exists.]

[The capital murder was committed while the capacity of (defendant) to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse.

Check one of the following:

_____ All members of the jury find that this circumstance probably exists.

_____ At least one, but not all members of the jury find that this circumstance probably exists.

_____ No member of the jury finds that this circumstance probably exists.]

[The youth of (defendant) at the time of the commission of the capital murder.

Check one of the following:

_____ All members of the jury find that this circumstance probably exists.

_____ At least one, but not all members of the jury find that this circumstance probably exists.

_____ No member of the jury finds that this circumstance probably exists.]

[The capital murder was committed by another person and (defendant) was an accomplice and (his) (her) participation relatively minor.

Check one of the following:

_____ All members of the jury find that this circumstance probably exists.

_____ At least one, but not all members of the jury find that this circumstance probably exists.

_____ No member of the jury finds that this circumstance probably exists.]

[(Defendant) (has) (had) no significant history of prior criminal activity.

Check one of the following:

_____ All members of the jury find that this circumstance probably exists.

_____ At least one, but not all members of the jury find that this circumstance probably exists.

_____ No member of the jury finds that this circumstance probably exists.]

Other mitigating circumstances. Specify below in writing any other mitigating circumstances that all members of the jury find probably exists. If no member of the jury finds that other mitigating circumstances probably exist, leave the space below blank.

_____

_____

_____

Other mitigating circumstances. Specify below in writing any other mitigating circumstances that at least one but not all members of the jury find probably exists. If no member of the jury finds that other mitigating circumstances probably exist, leave the space below blank.

_____

_____

_____

_____

FOREMAN

NOTE ON USE

With respect to each mitigating circumstance listed on Form 2, the jury should indicate that either (1) all jurors find that a mitigating circumstance probably exists; or (2) at least one, but not all jurors find that the mitigating circumstance probably exists; or (3) no juror finds that the mitigating circumstance exists.

Mitigating circumstances include, but are not limited to, those listed in Ark. Code Ann. § 5-4-605. If supported by the evidence, it is permissible to include on Form 2 additional mitigating circumstances proffered by the defendant if the form is consistent with that above.

Mitigating circumstances are not limited to those in existence at the time of the capital murder but may include events that have occurred after the defendant's arrest or even during imprisonment pending a successful appeal from a death sentence. *Skipper v. South Carolina*, 476 U.S. 1 (1986), followed in *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230 (1987). The trial court is not required to instruct that a lingering doubt regarding guilt may be considered a mitigating circumstance. *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989).

The final portion of Form 2 permits the jury to specify any mitigating circumstances not specifically listed on the form.

There may be rare and extraordinary cases in which no specific mitigating circumstances are listed on the verdict form submitted to the jury. In such a case, Form 2 should include only the final portion in which the jury may specify in writing its own mitigating circumstances. In addition, Form 2 should be modified to require the jury to write "None" in the space provided for mitigating circumstances, thereby permitting an appellate court to determine that the jury considered and rejected any mitigating circumstances.

COMMENT

Mitigating circumstances are listed in Ark. Code Ann. § 5-4-605. However, the jury is not limited to these mitigating circumstances.

While the jury is free to determine that evidence does not mitigate the penalty imposed, it is not free to disregard such evidence presented to it. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, *cert. denied*, 434 U.S. 894 (1977).

In *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993), the Arkansas Supreme Court held that is not error to give Form 2 instead of a specific instruction detailing proffered mitigation, even though in a previous case, *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), the court indicated that the jury should be instructed only on mitigating and aggravating circumstances with respect to which some evidence is presented. *Also see Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982).

The addition of the word 'probably' in this instruction does not affect which party has the burden of proof. Any discrepancy between the wording of the instruction and

the wording of the statute, which does not include the word "probably," actually benefitted the defendant. *Thessing v. State*, — S.W. 3d —, 365 Ark. 384 (2006) WL 496141; *see also Thomas v. State*, — S.W. 3d —, (2007) WL 1447914.

(Text continued on page 10-49)

Form 3

CONCLUSIONS

The Jury, having reached its final conclusions, will so indicate by having its Foreman place a check mark in the appropriate space ( ) in accordance with the Jury's findings. In order to check any space, your conclusions must be unanimous. The Foreman of the Jury will then sign at the end of this form.

WE THE JURY CONCLUDE:

(a) ( ) The State has proved beyond a reasonable doubt one or more aggravating circumstances.

(If you do not unanimously agree to check paragraph (a), then skip (b) and (c) and sentence _____ *(defendant)* to life imprisonment without parole on Form 4.)

(b) ( ) The aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances found by any juror to exist.

(If you do not unanimously agree to check paragraph (b), then skip (c) and sentence _____ *(defendant)* to life imprisonment without parole on Form 4.)

(c) ( ) The aggravating circumstances justify beyond a reasonable doubt a sentence of death.

(If you do not unanimously agree to check paragraph (c), then sentence _____ *(defendant)* to life imprisonment without parole on Form 4.)

If you have checked paragraphs (a), (b), and (c), then sentence _____ *(defendant)* to death on Form 4.

Otherwise, sentence _____ *(defendant)* to life imprisonment without parole on Form 4.

_____

FOREMAN

NOTE ON USE

Following *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684, *cert. denied*, 465 U.S. 1051 (1984), the Arkansas Supreme Court has held that "[i]f there is evidence of an aggravating or mitigating circumstance, *however slight*, it is sufficient to submit that issue to the jury." *Dansby v. State*, 319 Ark. 506, 524, 893 S.W.2d 331, 341 (1995) [emphasis added].

COMMENT

The form does not mandate a death sentence or foreclose the jury's option to show mercy. *Dansby v. State*, 319 Ark. 506, 515–516, 893 S.W.2d 331, 336–337 (1995).

Form 4

VERDICT

We, the Jury, after careful deliberation, have determined that _____*(defendant)* shall be sentenced to:

A.( ) LIFE IMPRISONMENT WITHOUT PAROLE.

B.( ) DEATH.

(If you return a verdict of death, each juror must sign this verdict.)

_____ _____

FOREMAN

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

AMCI 2d 1009-EXP

CAPITAL MURDER: MITIGATION BASED ON MENTAL RETARDATION

Members of the Jury, you have found _____ *(defendant)* guilty of capital murder. After hearing arguments of counsel, you will again retire to deliberate and decide whether he is to be sentenced to death by lethal injection or to life imprisonment without parole.

_____ *(Defendant)* asserts a plea of mitigation based on mental retardation. To establish this plea he must prove that at the time of the offense he had:

(1) Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the developmental period, but no later than age 18; or

(2) Deficits in adaptive behavior.

In addition, you may find him mentally retarded if you find that he has an I.Q. of 65 or below, but, even if the evidence on this issue is unrebutted and you find that his I.Q. is 65 or below, you are not required to find him mentally retarded.

_____ *(Defendant)* has the burden of proving mental retardation by a preponderance of the evidence, unless mental retardation is proved by other evidence in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If the evidence with regard to mental retardation appears to be equally balanced, or if you cannot say upon which side it weighs heavier, then the plea of mental retardation has not been established.

If you unanimously find that _____ *(defendant)* was mentally retarded when the offense was committed, you will sentence him to life imprisonment without parole.

You should consider any evidence with respect to mental retardation first. Then, if you do not unanimously find that _____*(defendant)* has proved mental retardation by a preponderance of the evidence, you should consider the evidence presented on the issue of mental retardation in your deliberations on aggravating and mitigating circumstances.

NOTE ON USE

Use this instruction in conjunction with AMCI 2d 1009-VF.

This first paragraph of this instruction is the first paragraph of AMCI 2d 1008 verbatim. After the reading of this instruction is completed, the court should complete AMCI 2d 1008, beginning at paragraph two.

COMMENT

Ark. Code Ann. § 5-4-618, provides that "[n]o defendant with mental retardation at the time of committing capital murder shall be sentenced to death." The defendant has the burden of proving mental retardation by a preponderance of the evidence. "Mental Retardation" is defined as indicated in the text of the instruction. A rebuttable presumption that a defendant with an I.Q. of 65 or below is retarded is created by the act. This is the only case known where Arkansas law creates a rebuttable presumption in favor of the defendant. It is unknown whether cases such as *French v. State*, 256 Ark. 298, 506 S.W.2d 820 (1974) and *Rowland v. State*, 262 Ark. 783, 561 S.W.2d 304 (1978), holding that "a court may not [without violating Art. 7, Section 23 of the Arkansas Constitution] inform a jury that a specific fact shown by the evidence is sufficient to support a certain inference," *Rowland v. State,* 262 Ark. 791, 561 S.W.2d 309 (1978), should be read to deprive a presumptively retarded defendant in a death case of a statutory rebuttable presumption created for his benefit. The language of the instruction gives effect to the statutory presumption, but, in keeping with Ark. Code Ann. § 5-1-111(e)(2), also makes it clear that a finding of an I.Q. of 65 does not, *ipso facto*, compel the conclusion that the defendant is retarded.

AMCI 2d 1009-VF

CAPITAL MURDER: MENTAL RETARDATION

Do you, the Jury, unanimously find by a preponderance of the evidence that at the time he committed the capital murder _____ *(defendant)* was mentally retarded?

YES _____

NO _____

_____

FOREMAN

If your answer is yes, you will sentence the defendant to life imprisonment without parole. If your answer is no, you will consider the aggravating and mitigating evidence presented to you and complete the forms provided you by the court.

NOTE ON USE

This instruction should be used only in conjunction with AMCI 2d 1009-EXP.

COMMENT

The fact that the jury returned a "NO" answer on this form did not indicate that the jury believed it was precluded from considering the defendant's mental retardation or intellectual deficit as a mitigating factor on AMCI 2d 1008, Form 2. *Camargo v. State,* 337 Ark. 105, 987 S.W.2d 680 (1999).

CHAPTER 11

KIDNAPPING AND FALSE IMPRISONMENT

SYNOPSIS

1101. Kidnapping

1101-EXP. Kidnapping — Stage One Verdict Explanation — Multiple Possible Verdicts

1101-VF. Kidnapping — Stage One Verdict Form — Multiple Possible Verdicts

1102. False Imprisonment in the First Degree

1103. False Imprisonment in the Second Degree

1104. Vehicular Piracy

1105. Permanent Detention or Restraint

AMCI 2d 1101
KIDNAPPING

(Defendant(s)) [is] [are] **charged with the offense of kidnapping. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That (defendant(s)) **did without consent of** (victim) **restrain him so as to interfere substantially with his liberty; and**

Second: That (defendant(s)) **restrained** (victim) **with the purpose of**

[holding him for (ransom) (reward) (or) ((act to be performed or not to be performed in return for his release))]

[using him as a (shield) (or) (hostage)]

[facilitating the commission of (any felony) (or flight thereafter)]

[inflicting physical injury upon him]

[engaging in (sexual intercourse) (deviate sexual activity) (sexual contact)]

[terrorizing (him) (or) (another person)]

[interfering with the performance of any governmental or political function].

Definitions

A person is "restrained without consent" if [he is restrained by (physical force) (or) (threat) (or) (deception)] [or] [being (under the age of fourteen) (incompetent) he is restrained without the consent of a parent, guardian, or other person responsible for general supervision of his welfare].

[A person is "incompetent" if he is unable to care for himself because of (physical) (or) (mental) (disease) (or) (defect) (whether or not a court has declared him incompetent).]

"Serious physical injury" means physical injury that creates a substantial risk of death or causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

"Knowingly."—A person acts knowingly with respect to the results of his conduct when he is aware that it is practically certain that his conduct will cause such results.

"Purpose."—A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Physical injury" means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.

"Sexual intercourse" means the penetration, however slight, of the labia majora by a penis.

"Deviate sexual activity" means any act of sexual gratification involving: [The

penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person;] [The penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs or anus of a person, or the breast of a female.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that it would be helpful to the jury.

This instruction should be used in conjunction with AMCI 2d 1101-EXP and 1101-VF if the evidence affords the jury the option of selecting a verdict from the alternatives provided therein.

COMMENT

Ark. Code Ann. § 5-11-102. "Physical injury" is defined in Ark. Code Ann. § 5-1-102(14). "Restraint without consent" is defined in § 5-11-101. "Purpose" is defined in Ark. Code Ann. § 5-2-202. "Sexual intercourse," "deviate sexual activity," and "sexual contact" are defined in Ark. Code Ann. § 5-14-101.

The kind of restraint that is considered incident to a crime is that which is necessary to consummate the act, and any additional restraint will support a kidnapping conviction. *Wofford v. State*, 44 Ark. App. 94, 867 S.W.2d 181 (1993); *Harris v. State*, 299 Ark. 433, 774 S.W.2d 121 (1989).

Restraint exceeding that normally incident to the crime of rape will support a conviction of kidnapping. *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989).

Kidnapping may be a Class Y felony or a Class B felony.

(Text continued on page 11-5)

AMCI 2d 1101-EXP
KIDNAPPING — STAGE ONE VERDICT EXPLANATION — MULTIPLE POSSIBLE VERDICTS

If you find_____(defendant(s)) guilty of kidnapping, you will so indicate on the verdict form provided you. You will also indicate whether [he] [they] [or a person acting with (him) (them)] **voluntarily released_____(victim(s)) alive and in a safe place prior to trial._____(Defendant(s))** [has] [have] **the burden of proving such a release by a preponderance of the evidence, unless it is proved by other evidence in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If the evidence with regard to the existence of the release appears to be equally balanced, or if you cannot say upon which side it weighs heavier, then it has not been established.**

If you find that voluntary release has not been proved, you will so indicate on the verdict form.

If your verdict is not guilty, you will so indicate on the verdict form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1101 and 1101-VF where the evidence affords the jury a rational basis for finding that release of the victim has been proved. In other cases, use AMCI 2d 1101 in conjunction with AMCI 2d 8101 and 8301-VF.

AMCI 2d 1101-VF
KIDNAPPING — STAGE ONE VERDICT FORM — MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that_____(defendant) is guilty of kidnapping, and we further find that he_____ has _____has not proved by a preponderance of the evidence that he [or a person acting with him] **released the victim(s) alive and in a safe place prior to trial.**

_____

FOREMAN

We, the Jury, find_____(defendant) not guilty.

_____

FOREMAN

NOTE ON USE

This verdict form should be used only in conjunction with AMCI 2d 1101-EXP.

If a verdict of guilt is returned, the appropriate standard punishment instruction and verdict form should be used in Stage Two.

AMCI 2d 1102
FALSE IMPRISONMENT IN THE FIRST DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of false imprisonment in the first degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ (defendant(s)), without consent and without lawful authority, knowingly restrained _____ (victim(s)) so as to interfere substantially with [his] [their] **liberty; and**

Second: That the restraint of _____ (victim(s)) exposed [him] [them] **to a substantial risk of serious physical injury.**

Definitions

A person is "restrained without consent" if [he is restrained by (physical force) (or) (threat) (or) (deception)] [or] [being (under the age of 14) (incompetent) he is restrained without the consent of a parent, guardian, or other person responsible for general supervision of his welfare].

[A person is incompetent if he is unable to care for himself because of (physical) (or) (mental) (disease) (or) (defect) (whether or not a court has declared him incompetent).]

"Serious physical injury" means physical injury that creates a substantial risk of death or causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

"Knowingly."—A person acts knowingly with respect to the results of his conduct when he is aware that it is practically certain that his conduct will cause such results.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that it would be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-11-103. "Restraint without consent" and "incompetent" are defined in § 5-11-101. "Serious physical injury" is defined in Ark. Code Ann. § 5-1-102. "Knowingly" is defined in Ark. Code Ann. § 5-2-202.

False imprisonment in the first degree is a Class C felony.

False imprisonment in the first degree is not a lesser included offense of kidnapping. *Sweet v. State*, 2011 Ark. 20, ___ S.W.3d ___.

AMCI 2d 1103
FALSE IMPRISONMENT IN THE SECOND DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of false imprisonment in the second degree. To sustain this charge the State must prove beyond a reasonable doubt that** _____ **(defendant(s)), without consent and without lawful authority, knowingly restrained** _____ **(victim(s)) so as to interfere substantially with** [his] [their] **liberty.**

Definitions

A person is "restrained without consent" if [he is restrained by (physical force) (or) (threat) (or) (deception)] [or] [being (under the age of fourteen) (incompetent) he is restrained without the consent of a parent, guardian, or other person responsible for general supervision of his welfare].

A person is incompetent if he is unable to care for himself because of (physical) (or) (mental) (disease) (or) (defect) (whether or not a court has declared him incompetent).

"Knowingly."—A person acts knowingly with respect to the results of his conduct when he is aware that it is practically certain that his conduct will cause such results.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that it would be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-11-104. "Restraint without consent" and "incompetent" are defined in § 5-11-101. "Knowingly" is defined in Ark. Code Ann. § 5-2-202.

False imprisonment in the second degree is a class A misdemeanor.

False imprisonment in the second degree is not a lesser included offense of kidnapping. *Sweet v. State*, 2011 Ark. 20, 370 S.W.3d 510.

Second-degree false imprisonment in not a lesser-included offense of kidnapping. *Wallace v. State*, 2017 Ark. App. 659.

AMCI 2d 1104
VEHICULAR PIRACY

_____ *(Defendant(s))* [is] [are] **charged with the offense of vehicular piracy. To sustain this charge the State must prove that** _____ **(defendant(s))** [without lawful authority] [seized] [or] [exercised control over] **by** [force] [or] [threat of violence] [(an aircraft occupied by an unconsenting person) (a vehicle having a seating capacity of more than eight passengers and operated by a [common] [contract] carrier of passengers for hire and occupied by an unconsenting person)].

NOTE ON USE

The trial judge may find it advisable to instruct the jury that the aircraft, bus, etc., is a vehicle within the meaning of the statute.

COMMENT

Ark. Code Ann. § 5-11-105.

Vehicular piracy of an aircraft is a Class B felony; otherwise it is a Class C felony.

AMCI 2d 1105
PERMANENT DETENTION OR RESTRAINT

_____ *(Defendant(s))* [is] [are] **charged with the offense of permanent detention or restraint. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ **(defendant(s)) restrained** _____ **(victim(s)) without consent** [and without lawful authority]; **and**

Second: That [he] [they] **did so with the purpose of** [holding] [or] [concealing] _____ *(victim(s))* [without ever releasing (him) (them)] [or] [without ever returning (him) (them) to the (person) (or) (institution) from whose lawful custody (he was) (they were) taken].

Definition

"Purpose."—A person acts with purpose with respect to his conduct when it is his conscious object to engage in the conduct.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it would be helpful to the jury.

Permanent detention or restraint is a Class B felony, unless the person restrained is the child of the defendant, in which case it is a Class D felony. If the evidence raises an issue as to whether the person restrained was the child of the defendant, a special explanatory instruction and a special verdict form permitting either finding should be given. For example, *see* AMCI 2d 1005-EXP and 1005-VF.

COMMENT

Ark. Code Ann. § 5-11-106. "Purpose" is defined in Ark. Code Ann. § 5-2-202.

Chapter 12

ROBBERY

1201.	Aggravated Robbery
1201-EXP.	Aggravated Robbery — Stage One Verdict Explanation — Multiple Possible Verdicts
1201-VF.	Aggravated Robbery — Stage One Verdict Form — Multiple Possible Verdicts
1202.	Robbery

AMCI 2d 1201
AGGRAVATED ROBBERY

_____ *(Defendant(s))* [is] [are] **charged with the offense of aggravated robbery. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That, with the purpose of committing a theft [or resisting apprehension immediately thereafter], _____ *(defendant(s))* [employed] [or] [threatened to immediately employ] **physical force upon another; and**

Second: That_____(defendant(s)) [was] [were] [armed with a deadly weapon] [or] [represented by words or conduct that (he was) (they were) armed with a deadly weapon] [or] [(inflicted) (or) (attempted to inflict) (death) (or) (serious physical injury) upon another person].

Definitions

"Deadly weapon" — means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious physical injury] [anything that in the manner of its use or intended use is capable of causing death or serious physical injury].

"Physical force" — means any bodily impact, restraint, or confinement.

"Purpose." — A person acts with purpose with respect to his conduct when it is his conscious object to engage in the conduct.

"Serious physical injury" — means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-12-103. "Purpose" is defined in Ark. Code Ann. § 5-2-202. "Physical force" is defined in Ark. Code Ann, § 5-12-101. "Serious physical injury" and "deadly weapon" are defined in Ark. Code Ann. § 5-1-102.

Aggravated assault is a separate offense from aggravated robbery and not an included offense. *Birchett v. State*, 294 Ark. 176, 741 S.W.2d 267 (1987); *but see Bishop v. State*, 294 Ark. 303, 742 S.W.2d 911 (1988) (aggravated assault is an included offense of aggravated robbery).

In certain circumstances battery in the first degree may be a lesser included offense of aggravated robbery. *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986).

Theft is not a lesser included offense of aggravated robbery. *Higgins v. State*,

270 Ark. 19, 603 S.W.2d 401 (1980); *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985).

Neither ownership nor transfer of property is an element of proof. *McKinzy v. State*, 313 Ark. 334, 853 S.W.2d 888 (1993); *Mitchell v. State,* 281 Ark. 112, 661 S.W.2d 390 (1983).

Aggravated robbery is a Class Y felony.

Testimony by the victim that gun used by defendant to commit theft appeared to be fake provided a rational basis for the jury to acquit on the charge of aggravated robbery and convict on the lesser charge of robbery. Consequently, trial court erred when it refused requested instruction on robbery. *Brown and Thornhill v. State,* 347 Ark. 44, 60 S.W.3d 422 (2001).

Failure to instruct the jury that a person cannot commit a robbery, and therefore cannot commit an aggravated robbery, in retaking gambling losses, was reversible error. *Daniels v. State*, 373 Ark. 536 (2008), *citing Davidson v. State*, 200 Ark. 495, 139 S.W.2d 409 (1940) [decision under prior law; see Act 460 of 2009].

AMCI 2d 1201-EXP
AGGRAVATED ROBBERY — STAGE ONE VERDICT EXPLANATION — MULTIPLE POSSIBLE VERDICTS

If you find_____(defendant(s)) guilty of aggravated robbery [or _____] *(lesser included offense)*, **you will so indicate on the verdict form provided you. You will also make a finding about whether_____(defendant(s))** [was] [were] **armed with a deadly weapon, as requested on the form.**

If you reach a verdict of not guilty, you will indicate this on the form.

NOTE ON USE

This instruction should be used on conjunction with AMCI 2d 1201 and 1201-VF where the defendant is charged with being armed with a deadly weapon. In other cases, use AMCI 2d 1201 in conjunction with AMCI 2d 8101 and 8301-VF.

Where a lesser included offense instruction has been given, the bracketed reference to the lesser included offense should be given.

AMCI 2d 1201-VF
AGGRAVATED ROBBERY — STAGE ONE VERDICT FORM — MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that_____(defendant) is guilty of aggravated robbery.

_____

FOREMAN

[We, the Jury, find beyond a reasonable doubt that_____(defendant) is guilty of_____(lesser included offense).

_____

FOREMAN]

We, the Jury, find_____(defendant) not guilty.

_____

FOREMAN

If your verdict is guilty of aggravated robbery, you shall complete the following:

Do you, the Jury, find beyond a reasonable doubt that _____*(defendant)* was armed with a deadly weapon?

YES _____

NO _____

_____

FOREMAN

NOTE ON USE

This verdict form should be used only in conjunction with AMCI 2d 1201-EXP.

Where the jury has been instructed on a lesser included offense, the bracketed reference to the lesser included offense should be given.

If the jury convicts the defendant of aggravated robbery and finds that he was armed with a deadly weapon, and the defendant is charged under Ark. Code Ann. § 5-12-103(c) with having previously been convicted of aggravated robbery with a deadly weapon, then AMCI 2d 9204 and AMCI 2d 9314-VF should be given in Stage Two.

If the jury convicts the defendant of aggravated robbery and finds that he was armed with a deadly weapon, and the defendant is not charged with having previously been convicted of aggravated robbery with a deadly weapon and is not charged as an habitual offender, then AMCI 2d 9203 and AMCI 2d 9310-VF should be given in Stage Two.

If the jury convicts the defendant of aggravated robbery, and the defendant is charged as an habitual offender, then, whether or not he was armed with a deadly weapon, AMCI 2d 9201 and 9311-VF should be given in Stage Two.

If the jury convicts the defendant of aggravated robbery and finds that he was not armed with a deadly weapon, and the defendant is not charged as an habitual offender, then AMCI 2d 9101 and 9301-VF should be given in Stage Two.

AMCI 2d 1202
ROBBERY

_____ *(Defendant(s))* [is] [are] **charged with the offense of robbery. To sustain this charge the State must prove beyond a reasonable doubt that with the purpose of committing a theft** [or resisting apprehension immediately thereafter], _____ *(defendant(s))* [employed] [or] [threatened to immediately employ] **physical force upon another.**

Definitions

"Physical force"—means any bodily impact, restraint, or confinement.

"Purpose."—A person acts with purpose with respect to his conduct when it is his conscious object to engage in the conduct.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-12-102. "Physical force" is defined in Ark. Code Ann. § 5-12-101. "Purpose" is defined in Ark. Code Ann. § 5-2-202.

Theft is not a lesser included offense of robbery. *Thompson v. State,* 284 Ark. 403, 682 S.W.2d 742 (1985); *Higgins v. State*, 270 Ark. 19, 603 S.W.2d 401 (1980); *Cartwright v. State*, 2016 Ark. App. 425.

Neither ownership nor transfer of property is an element of proof. *McKinzy v. State*, 313 Ark. 334, 853 S.W.2d 888 (1993); *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983).

Robbery is a Class B felony.

Testimony by the victim that gun used by defendant to commit theft appeared to be fake provided a rational basis for the jury to acquit on the charge of aggravated robbery and convict on the lesser charge of robbery. Consequently, trial court erred when it refused requested instruction on robbery. *Brown and Thornhill v. State,* 347 Ark. 44, 60 S.W.3d 422 (2001).

Ordinary robbery is generally a lesser-included offense of aggravated robbery but when the evidence conclusively shows that aggravated robbery was committed, an instruction on mere robbery is not required. *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004).

Failure to instruct the jury that a person cannot commit a robbery in retaking gambling losses was reversible error. *Daniels v. State*, 373 Ark. 536 (2008), *citing Davidson v. State*, 200 Ark. 495, 139 S.W.2d 409 (1940) [decision under prior law; see Act 460 of 2009].

Circuit court did not abuse its discretion in refusing to instruct the jury on

ordinary robbery because the evidence provided by the State clearly establishes defendant was guilty of aggravated robbery. *Sweet v. State*, 2011 Ark. 20, 370 S.W.3d 510.

The trial court did not err in refusing to give a jury instruction on robbery as a lesser-included offense of aggravated robbery where it was undisputed that an armed robbery took place. *Mace v. State*, 2012 Ark. App. 420; *Nickelson v. State*, 2012 Ark. App. 363.

CHAPTER 13

BATTERY AND ASSAULT

SYNOPSIS

1301. Battery In The First Degree—No Other Felony Involved

1301-A. Battery In The First Degree, Committed In Connection With Another Felony

1301-AD. Battery In The First Degree, Committed In Connection With Another Felony—Affirmative Defense

1301-B. Battery In The First Degree—Explanation Of Associated Felony

1301-X. Battery In The First Degree—Unborn Child

1301-XB. Battery In The First Degree—Explanation Of Associated Felony or Misdemeanor Resulting In Serious Physical Injury to Unborn Child

1301-EXP. Battery in the First Degree—No Other Felony Involved Explanation—Multiple Possible Verdicts

1301-VF. Battery in the First Degree—No Other Felony Involved—Multiple Possible Verdicts

1302. Battery In The Second Degree

1303. Battery In The Third Degree

1304. Aggravated Assault

1304-A. Aggravated Assault On Law Enforcement Officer or Employee Of Correctional Facility

1305. Assault In The First Degree

1306. Assault In The Second Degree

1307. Assault In The Third Degree

1308. Stalking In The First Degree

1308-AD. Stalking in the First Degree—Affirmative Defense

1309. Stalking In The Second Degree

1309-AD. Stalking In The Second Degree—Affirmative Defense

1310. Terroristic Threatening In The First Degree

1311. Terroristic Threatening In The Second Degree

1312. Terroristic Act

1312-EXP. Terroristic Act—Stage One Verdict Explanation—Multiple Possible Verdicts

1312-VF. Terroristic Act—Stage One Verdict Form—Multiple Possible Verdicts

1313. Coercion

1314. Exposing Another Person to Human Immunodeficiency Virus
1315. Installing Or Maintaining A Booby Trap
1316. Unlawful Discharge Of Firearm From Vehicle—First Degree
1317. Unlawful Discharge Of Firearm From Vehicle—Second Degree
1318. Threatening To Commit An Act Of Mass Violence On School Property

AMCI 2d 1301
BATTERY IN THE FIRST DEGREE—NO OTHER FELONY INVOLVED

_____ *(Defendant(s))* [is] [are] **charged with the offense of battery in the first degree. To sustain this charge the State must prove beyond a reasonable doubt that:**

[_____ *(Defendant(s))*, with the purpose of causing serious physical injury to (_____) *(victim)* (or) (another person), caused serious physical injury to_____ *(victim)* by means of a deadly weapon.]

[_____ *(Defendant(s))*, with the purpose of causing physical injury to (_____) *(victim)* (or) (another person), caused physical injury to_____ *(victim)* by means of a firearm.]

[_____ *(Defendant(s))*, with the purpose of (seriously and permanently disfiguring [_____] *(victim)* [or] [another person]) (destroying, amputating, or permanently disabling a member or organ of the body of [_____] *(victim)* [or] [another person]), caused such an injury to _____ *(victim)*.]

[_____ *(Defendant(s))* caused serious injury to _____ *(victim)* under circumstances manifesting extreme indifference to the value of human life.]

[_____ *(Defendant(s))* (recklessly caused physical injury to (_____) *(pregnant victim)* (or) (caused physical injury to _____ *(pregnant victim)* under circumstances manifesting extreme indifference to the value of human life) causing her to suffer (a miscarriage) (a stillbirth) as a result of that injury.]

[_____ *(Defendant(s))* knowingly and without legal justification caused serious physical injury to (_____) *(victim)* (a person) known by _____ *(defendant(s))* to be (below the age of 13) (60 years of age or older).]

[_____ *(defendant(s))* knowingly caused serious physical injury to (_____) *(victim)* (a person) who was four years of age or younger under circumstances manifesting extreme indifference to the value of human life.]

Definitions

"Firearm"—means any device designed, made, or adapted to expel a projectile by the action of an explosive.

"Knowingly."—A person acts knowingly (or with knowledge) with respect to his conduct or the circumstances that exist at the time of his act when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is

practically certain that his conduct will cause such a result.

"Physical injury"—means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with trauma.

"Purpose."—A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Recklessly."—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.

"Serious physical injury"—means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

The definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

Use with AMCI 2d 1301-EXP and 1301-VF, especially where there is a factual issue as to the victim's status.

COMMENT

Ark. Code Ann. § 5-13-201(a)(5)(B). "Firearm" and "serious physical injury" are defined in Ark. Code Ann. § 5-1-102. "Purpose" is defined in Ark. Code Ann. § 5-2-202. "Recklessly" and "knowingly" are defined in Ark. Code Ann. § 5-2-202.

The Arkansas Supreme Court has interpreted the language "under circumstances manifesting extreme indifference to the value of human life" (Ark. Code Ann. § 5-13-201(a)(3)) to require proof of actions by the defendant "which create at least some risk of death and which, therefore, evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim." *Tigue v. State*, 319 Ark. 147, 151–152, 889 S.W.2d 760, 762 (1994). The fact that the victim receives serious physical injuries does not *ipso facto* mean that the State has carried its burden of proof.

Battery in the first degree is a Class B felony unless it is committed against a child of four years of age or younger under circumstances manifesting extreme indifference to the value of human life (section 5-13-201 (a)(9)), or the third bracketed option involving disfiguring (section 5-13-201 (a)(2)), or against a law enforcement officer or an employee of a correctional facility acting in the line of duty in which cases it is a Class Y felony.

The model jury instructions for the offense of first-degree battery against a law enforcement officer and the verdict formed used in appellant's case properly

required the jury to find beyond a reasonable doubt that the victim of appellant's crime was a law enforcement officer acting in the line of duty before the penalty classification for appellant's crime was enhanced from a Class B felony to a Class Y felony. Under the plain language of Ark. Code Ann. § 5-13-201, the State was required to prove that appellant had the requisite level of intent in committing battery in the first degree and that appellant's victim was a law enforcement officer acting in the line of duty. The statute did not require the State to prove that appellant knew or should have known that the victim was a law enforcement officer acting in the line of duty. *Boose v. State*, 2017 Ark. App. 302.

(Text continued on page 13-7)

AMCI 2d 1301-A

BATTERY IN THE FIRST DEGREE, COMMITTED IN CONNECTION WITH ANOTHER FELONY

_____ *(Defendant(s))* [is] [are] **charged with the offense of battery in the first degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant(s))* [acting alone or with one or more other persons] [committed] [or] [attempted to commit] _____ *(felony)*; **and**

Second: That in the course of or in furtherance of that _____*(felony)* [or in immediate flight therefrom]:

[(_____) *(Defendant(s))* (or) (a person acting with [him] [them] [defendant(s)]) caused serious physical injury to _____ *(victim)* under circumstances manifesting extreme indifference to the value of human life; (or)]

[_____ *(Another person)*, who was resisting the offense (or flight), caused serious physical injury to _____ *(victim)*.]

Definition

"Serious physical injury." — means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-13-201. "Serious physical injury" is defined in Ark. Code Ann. § 5-1-102.

Battery in the first degree is a Class B felony.

AMCI 2d 1301-AD

BATTERY IN THE FIRST DEGREE, COMMITTED IN CONNECTION WITH ANOTHER FELONY — AFFIRMATIVE DEFENSE

First: That _____ *(defendant)* **was not the only participant in the commission or attempted commission of** _____ *(felony)*;

[and]

Second: That he reasonably believed that no other participant intended to engage in conduct which could result in serious physical injury; [and]

[Third: That he was not armed with a deadly weapon;] [and]

[Third:] [Fourth:] [That he reasonably believed that no other participant was armed with a deadly weapon.]

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

The first and second paragraphs will ordinarily be given. Whether the third or fourth, or both, should be given depends upon the evidence.

COMMENT

Ark. Code Ann. § 5-13-201(b).

AMCI 2d 1301-B

BATTERY IN THE FIRST DEGREE — EXPLANATION OF ASSOCIATED FELONY

As a part of the charge of battery in the first degree the State contends that serious physical injury to _____ *(victim)* **occurred during the** [commission] [or] [attempted commission] **of the crime(s) of** _____ *(felony)* [or in immediate flight therefrom].

To prove the crime of _____ *(applicable felony)* **the State must prove beyond a reasonable doubt:**

[Insert appropriate elements from instruction on applicable felony and repeat the second paragraph of this instruction for each felony upon which the court is instructing.]

NOTE ON USE

This explanation should be given when there is an issue of fact whether the circumstances surrounding the asserted battery amounted to the commission or attempted commission of a particular felony, or immediate flight therefrom.

COMMENT

Ark. Code Ann. § 5-13-201(a)(4).

AMCI 2d 1301-X

BATTERY IN THE FIRST DEGREE — UNBORN CHILD

_____(Defendant(s)) [is] [are] **charged with the offense of battery in the first degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

[That _____(defendant) **with the purpose of causing serious physical injury to** (an unborn child) (or) (a woman who was pregnant with the unborn child) **caused serious physical injury to the unborn child.]**

[or]

[First: That _____(defendant) **committed** _____ (felony or Class A misdemeanor);

Second: That, in the commission of _____(felony or Class A misdemeanor), _____(defendant(s)) **knowingly caused physical injury to a pregnant woman causing serious physical injury to her *unborn child and the unborn child is subsequently born alive.]***

Definitions

"Knowingly" — A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Physical injury" "Physical injury" means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.

"Purpose" — A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

"Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

The definitions should be given when requested by counsel or when the court feels that it would be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-13-201(a)(5)(6). "Physical injury" and "serious physical injury" are defined in Ark. Code Ann. § 5-1-102. "Purposely" and "knowingly" are defined in Ark Code Ann. § 5-2-202.

Battery in the first degree is a Class B felony.

AMCI 2d 1301-XB
BATTERY IN THE FIRST DEGREE—UNBORN CHILD—EXPLANATION OF ASSOCIATED FELONY OR MISDEMEANOR RESULTING IN SERIOUS PHYSICAL INJURY TO UNBORN CHILD

As part of the charge of battery in the first degree, the State contends that serious physical injury to an unborn child occurred during the commission of the crime(s) of_____(felony or Class A misdemeanor).

To prove the crime of_____(applicable crime), **the State must prove beyond a reasonable doubt:**

[Insert appropriate elements from instruction on applicable crime and repeat the second paragraph of this instruction for each crime upon which the court is instructing.]

NOTE ON USE

This explanation should be given when there is an issue of fact whether the circumstances surrounding the asserted battery amounted to the commission of a particular felony or Class A misdemeanor.

COMMENT

Ark. Code Ann. § 5-13-201(a)(5)(6).

AMCI 2d 1301-EXP
BATTERY IN THE FIRST DEGREE—NO OTHER FELONY INVOLVED EXPLANATION—MULTIPLE POSSIBLE VERDICTS

If you find (defendant) guilty of battery in the first degree, you will so indicate on the verdict form provided to you. [You will also make a finding about the circumstances of the offense as directed on the form.]

If you reach a verdict of not guilty, you will indicate this on the form.

Definition

"Employee of a correctional facility" means a person who is employed by or working under a professional services contract with the Department of Correction or the Department of Community Correction.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1301 and 1301-VF where there is a factual issue as to the victim's status. Battery in the first degree is a Class B felony unless it is committed against a child of four years of age or younger under circumstances manifesting extreme indifference to the value of human life or involves disfigurement, or against a law enforcement officer or an employee of a correctional facility acting in the line of duty in which cases it is a Class Y felony.

AMCI 2d 1301-VF
BATTERY IN THE FIRST DEGREE—NO OTHER FELONY INVOLVED—MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that (defendant) is guilty of battery in the first degree.

_____

FOREMAN

We, the Jury, find (defendant) not guilty.

_____

FOREMAN

[If your verdict is guilty, you shall complete the following:]

[Do you, the Jury, find beyond a reasonable doubt that the victim was [a law enforcement officer] [an employee of a correctional facility] acting in the line of duty?

YES _____

NO _____

_____

FOREMAN]

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1301 and 1301-EXP where there is a factual issue as to the victim's status. Battery in the first degree is a Class B felony unless it is committed against a child of four years of age or younger under circumstances manifesting extreme indifference to the value of human life or involves disfigurement, or against a law enforcement officer or an employee of a correctional facility acting in the line of duty in which cases it is a Class Y felony.

AMCI 2d 1302
BATTERY IN THE SECOND DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of battery in the second degree. To sustain this charge the State must prove beyond a reasonable doubt that:**

[_____ **(Defendant(s))**, with the purpose of causing physical injury to (_____ *(victim)*) (or) (another person), caused serious physical injury to _____ *(victim)*.]

[_____ **(Defendant(s))**, with the purpose of causing physical injury to (_____ *(victim)*) (or) (another person), caused physical injury to _____ *(victim)* by means of a deadly weapon other than a firearm.]

[_____ **(Defendant(s))** recklessly caused serious physical injury to _____ *(victim)* (by means of a deadly weapon) (while operating or in actual physical control of a (motor vehicle) (or) (motorboat) if at the time _____ (Defendant) was (intoxicated) (or) (the alcohol concentration in (his)(her) breath or blood was 0.08 or more).]

[_____ **(Defendant(s))** knowingly **and without legal justification (*caused physical injury to*) (*incapacitated*) a person he knew to be:**

(a [teacher] [or] [other school employee] while acting in the course of employment.)

(a person 12 years old or younger.)

(a person 60 years old or older.)

(an [officer] [or] [employer] of the state acting in the performance of his lawful duties.)

([a law enforcement officer], [a firefighter], [a code enforcement officer] [or] [an employee of a correctional facility] while such [officer], [firefighter], [code enforcement officer] [or] [correctional facility employee] is acting in the line of duty.)

([a physician] [or] [a person certified as an emergency medical technician] [or] [a (licensed) (or) (certified) health care professional] [or] [other health care provider] [while performing emergency medical services] [or] [while in the course of employment relating to such person's medical training].)

(a person who is incompetent.)]

Definitions

"Alcohol concentration" means (grams of alcohol per one hundred (100) milliliters, or cubic centimeters, of blood) (or) (grams of alcohol per two hundred ten (210) liters of breath). (The alcohol concentration of urine, saliva, or other bodily substances shall be based upon grams of alcohol per one hundred (100) milliliters, or cubic centimeters, of blood, the same being percent weight per volume or percent alcohol concentration.)

"Chemical test"—A chemical test is one that analyzes a person's [blood] [urine] [saliva] [breath] [or] [other bodily substance] for determining the alcohol content in the blood or breath. The test and the methods by which it is performed must be approved by the Arkansas State Department of Health, or the test must be made by the State Crime Laboratory or be given by a person possessing a valid permit to administer it.

"Code enforcement officer"—means an individual charged with the duty of enforcing a municipal code, ordinance, or regulation.

"Controlled substance"—means a drug, substance, or immediate precursor in Schedules I-VI established by Ark. Code Ann. §§ 5-64-101 et seq.

"Deadly weapon"—means [a firearm] [or] [anything manifestly designed, made, adapted for the purpose of inflicting death or serious physical injury] [or] [anything that in the manner of its use or intended use is capable of causing death or serious physical injury].

"Employee of a correction facility"—includes a person working under a professional services contract with (the Department of Correction) (the Department of Community Correction)) (or) (the Division of Youth Services).

"Firearm"—means any device designed, made, or adapted to expel a projectile by the action of an explosive.

"Intoxicated"—means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself or herself of another person.

"Motorboat"—means any vessel operated upon water and that is propelled by machinery, whether or not the machinery is the principal source of propulsion, and includes personal watercraft. Personal watercraft means a vessel which uses an inboard motor powering a water jet pump as its primary source of motive power and which is designed to be operated by a person sitting, standing, or kneeling on the vessel rather than in the conventional manner of sitting or standing inside the vessel.

"Physical injury"—means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.

"Purpose."—A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Recklessly."—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.

"Serious physical injury"—means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury. Where a jury question arises concerning whether a "victim" is "certified" or "licensed," counsel should prepare any necessary instructions.

COMMENT

Ark Code Ann. § 5-13-202. "Serious physical injury," "physical injury," and "deadly weapon" are defined in Ark. Code Ann. § 5-1-102. "Purpose" and "recklessly" are defined in Ark. Code Ann. § 5-2-202. "Emergency medical technician" is defined in Ark. Code Ann. § 20-13-202, and "code enforcement officer" is defined in Ark. Code Ann. § 5-13-202. "Incompetent" is defined in Ark. Code Ann. § 5-25-101 (3). "Alcohol concentration" and "chemical test" are defined in Ark. Code Ann. § 5-65-204. "Intoxicated" is defined in section 5-10-105(c). "Motorboat" is defined in section 5-65-102, and "personal watercraft" is defined in section 27-101-103(10).

Battery in the second degree is a Class D felony unless it is committed while operating or being in actual control of a vehicle or motorboat while intoxicated or having a blood alcohol level of (0.08) or more, in which case it is a Class C felony.

Trial court did not err in refusing to give defendant's proffered instruction on second-degree battery as a lesser-included offense of first-degree battery where the proffered instruction required an additional element, serious physical injury, that was not required in the first-degree battery. *Taylor v. State*, 77 Ark. App. 144, 72 S.W.3d 882 (2002); *State v. Spight*, 101 Ark. App. 400, 278 S.W.3d 599 (2008). Moreover, the proffered instruction was not a lesser-included offense because the offense was not an attempt offense, and the proffered instruction did not differ from the charged offense with respect to a less serious injury. *Taylor v. State*, 77 Ark. App. 144, 72 S.W.3d 882.

Circuit court did not abuse its discretion in refusing defendant's proffered second-degree-battery instruction which added an additional element, a deadly weapon, which was not an element of the first-degree-battery offense with which defendant was charged. The firearm enhancement was not an element of the first-degree-battery offense but was an additional sentence authorized by statute if defendant was convicted of first-degree battery and the jury determined that he employed a firearm during the commission of the offense. *Reed v. State*, 2011 Ark. App. 352, 383 S.W.3d 881.

The trial court did not abuse its discretion in denying defendant's proffered instruction on second degree battery because it added an additional element to the offense charged: a deadly weapon. *Reed v. State*, 2011 Ark. App. 352, 383 S.W.3d 881.

AMCI 2d 1303
BATTERY IN THE THIRD DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of battery in the third degree. To sustain this charge the State must prove beyond a reasonable doubt:**

[That _____ *(defendant(s))*, with the purpose of causing physical injury to (_____ *(victim)*) (or to) (another person), caused physical injury to _____ *(victim)*.]

[That _____ *(defendant(s))* recklessly caused physical injury to _____ *(victim)*.]

[That _____ *(defendant(s))* negligently caused physical injury to _____ *(victim)* by means of a deadly weapon.]

[That _____ *(defendant(s))* purposely caused (stupor) (or) (unconsciousness) (or) (physical impairment) (or) (mental impairment) (or) (injury) to _____ *(victim)* by administering to him without his consent any drug or other substance.]

Definitions

"Deadly weapon"—means [a firearm] [anything manifestly designed, made, adapted for the purpose of inflicting death or serious physical injury] [or] [anything that in the manner of its use or intended use is capable of causing death or serious physical injury].

"Negligently."—The term "negligently" as used in this criminal case means more than it does in civil cases. To prove negligence in a criminal case the State must show that defendant should have been aware of a substantial and unjustifiable risk that the injury would occur. The risk must have been of such a nature and degree that [his] [their] failure to perceive it, considering the nature and purpose of [his] [their] conduct and the circumstances known to [him] [them], involved a gross deviation from the standard of care that a reasonable person would have observed in [his] [their] situation.

"Physical injury"—means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.

"Purpose."—A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Recklessly."—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels

that they will be helpful to the jury. The term "negligently" must be defined unless the definition has been given in an earlier instruction.

COMMENT

Ark. Code Ann. § 5-13-203. "Physical injury" and "deadly weapon" are defined in Ark. Code Ann. § 5-1-102. "Purpose," "negligently," and "recklessly" are defined in Ark. Code Ann. § 5-2-202.

Battery in the third degree is a Class A misdemeanor.

Where the evidence established that the second victim, who sustained a gunshot wound to the neck and was bleeding from each side of his neck, incurred a "serious physical injury," there was no rational basis for giving the jury the third-degree battery instruction. *Bennett v. State*, 2014 Ark. App. 624, 447 S.W.3d 602.

AMCI 2d 1304
AGGRAVATED ASSAULT

_____ *(Defendant(s))* is charged with the offense of aggravated assault. To sustain this charge the State must prove the following things beyond a reasonable doubt:

[**First: That _____ *(defendant)* purposely engaged in conduct that created a substantial danger of** [death] [or] [serious physical injury] **to _____ *(victim)*;**]

OR

[**First: That _____ *(defendant)* purposely displayed a firearm in such a manner that created a substantial danger of** (death) (or) (serious physical injury) **to_____ *(victim)*;**]

OR

[**First: That _____ *(defendant)* purposely impeded or prevented _____ *(victim's)* respiration or blood circulation by applying pressure on the chest, throat or neck or blocking the nose or mouth of_____ *(victim)*;**]

AND

Second: That _____ *(defendant)* did so under circumstances manifesting extreme indifference to the value of human life.

Definitions

"Firearm"—means any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use, including such a device that is not loaded or lacks a clip or other component to render it immediately operable, and components that can be readily be assembled into such a device.

"Purposely."—A person acts purposely with respect to his conduct when it is his conscious object to engage in the conduct.

"Serious physical injury"—means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

Ark. Code Ann. § 5-14-204(c) states that the provisions of the statute defining aggravated assault "do not apply to law enforcement officers acting within the scope of their duty, or to any person acting in self defense or the defense of a third party." The Committee believes that this language is adequately covered by justification instructions. *See* AMCI 2d 708, which addresses when a law enforcement officer may threaten deadly physical force, and AMCI 2d 705, which

addresses the use of deadly physical force in defense of a person.

This instruction is appropriate for use where the defendant is charged with aggravated assault on a family or household member under Ark. Code Ann. § 5-26-306.

COMMENT

Ark. Code Ann. § 5-13-204. "Firearm" and "serious physical injury" are defined in Ark. Code Ann. § 5-1-102. "Purposely" is defined in Ark. Code Ann. § 5-2-202.

Aggravated assault is a Class D felony.

(Text continued on page 13-27)

AMCI 2d 1304-A
AGGRAVATED ASSAULT ON LAW ENFORCEMENT OFFICER OR EMPLOYEE OF CORRECTIONAL FACILITY

_____ *(Defendant)* [is] charged with the offense of aggravated assault on [a law enforcement officer] [an employee of a correctional facility]. To sustain this charge the State must prove the following things beyond a reasonable doubt:

[First: That _____ *(defendant)* purposely engaged in conduct that created a potential danger of infection to [a law enforcement officer] [an employee of a (state) (or) (local) correctional facility] while the [officer] [employee] was engaged in the course of (his) (her) employment by causing a person [he] [she] knew to be an [officer] [employee] to come into contact with (saliva) (blood) (urine) (feces) (seminal fluid) (or) (other bodily fluid); and

Second: That _____ *(defendant)* did so by purposely (throwing) (tossing) (expelling) (or) (transferring) such (fluid) (or) (material); and

Third: That _____ *(defendant)* did so under circumstances manifesting extreme indifference to the personal hygiene of the [officer] [employee].]

[First: That _____ *(defendant)* knowingly discharged a firearm;

Second: That _____ *(defendant)* did so with the purpose to cause serious physical injury or death to (a law enforcement officer) (or) (an employee of a correctional facility) while the (officer) (or) (employee) was acting within the scope of his or her official duties; and

Third: That _____ *(defendant)*

(was in custody as a result of a felony conviction)

(was unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction)

(had a felony conviction for an offense which contained as an element (the use or threat of violence against another person) (or) (the creation of a substantial risk of death or serious physical injury to another person)

(knowingly created a substantial risk of serious physical injury or death to a person other than (the law enforcement officer) (or) (the employee of a correctional facility)

(caused the death of more than one person)

(was acting with the purpose (to avoid or prevent an arrest) (or) (to escape from custody)

(was acting with the purpose to obtain a pecuniary gain)

(was acting with the purpose to disrupt or hinder the lawful exercise of any government or political function).]

Definitions

"Purposely."—A person acts purposely with respect to his conduct when it is his conscious object to engage in the conduct.

"Serious physical injury."—means physical injury that creates substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-13-211. "Purposely" is defined in Ark. Code Ann. § 5-2-202. "Serious physical injury" is defined in Ark. Code Ann § 5-1-102. Aggravated assault upon an employee of a correctional facility or a law enforcement officer is a Class D felony under section 5-13-211(a)(1) [the first bracketed option] or a Class Y felony under subdivision (a)(2) [the second bracketed option].

(Text continued on page 13-29)

AMCI 2d 1305
ASSAULT IN THE FIRST DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of assault in the first degree. To sustain this charge the State must prove beyond a reasonable doubt [that**_____ *(defendant(s))* **recklessly engaged in conduct which created a substantial risk of** [death] [or] [serious physical injury] **to**_____ *(victim(s))* **[that** *(defendant(s))* **purposely impeded or prevented** _____ *(victim's)* **respiration or blood circulation by applying pressure on the throat or neck or blocking the nose or mouth of**_____ *(victim).*]

Definitions

"Purposely." — A person acts purposely with respect to his conduct when it is his conscious object to engage in the conduct.

"Recklessly." — A person acts recklessly with respect to circumstances that exist at the time of his act or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.

"Serious physical injury" — means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

It is a defense to the offense set out in the second bracket that the other person consented to the impeding or preventing of his or her respiration or circulation of blood. If a jury issue is presented regarding this defense, then an instruction should be prepared, such as modification of AMCI 2d 7313-D.

COMMENT

Ark. Code Ann. § 5-13-205. "Serious physical injury" is defined in Ark. Code Ann. § 5-1-102. "Recklessly" is defined in Ark. Code Ann. § 5-2-202.

Assault in the first degree is a Class A misdemeanor.

It is a defense to the offense set out in the second bracket that the other person consented to the impeding or preventing of his or her respiration or circulation of blood. The enumerated defense is not designated as an "affirmative defense." Therefore, under Ark. Code Ann. § 5-1-111 (c), if there is evidence to support the defense, it must be submitted to the jury, and the jury must be told that any

reasonable doubt on that issue requires that the defendant be acquitted.

(Text continued on page 13-31)

AMCI 2d 1306

ASSAULT IN THE SECOND DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of assault in the second degree. To sustain this charge the State must prove beyond a reasonable doubt that** _____ *(defendant(s))* **recklessly engaged in conduct which created a substantial risk of physical injury to** _____ *(victim(s))*.

Definitions

"Physical injury." — means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma..

"Recklessly." — A person acts recklessly with respect to circumstances that exist at the time of his act or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-13-206. "Physical injury" is defined in Ark. Code Ann. § 5-1-102. "Recklessly" is defined in Ark. Code Ann. § 5-2-202.

Assault in the second degree is a Class B misdemeanor.

AMCI 2d 1307

ASSAULT IN THE THIRD DEGREE

_____ *Defendant(s))* [is] [are] **charged with the offense of assault in the third degree. To sustain this charge the State must prove beyond a reasonable doubt that** _____ *(defendant(s))* **purposely created apprehension of imminent physical injury to** _____ *(victim(s))*.

Definitions

"Physical injury." — means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.

"Purposely." — A person acts purposely with respect to the results of his conduct when it is his conscious object to cause the results.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-13-207. "Physical injury" is defined in Ark. Code Ann. § 5-1-102. "Purposely" is defined in Ark. Code Ann. § 5-2-202.

Assault in the third degree is a Class C misdemeanor.

AMCI 2d 1308
STALKING IN THE FIRST DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of stalking in the first degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant(s))* **knowingly engaged in a course of conduct that would place a reasonable person in** _____ **'s** (*insert name of alleged victim*) **position under emotional distress and in fear for** *(his (or) (her)* **safety or another person's safety; and**

Second: That _____ [*(defendant)* did so in contravention of an order of protection protecting (*insert name of alleged victim*] [or] [(*defendant*) has been convicted within the previous ten (10) years of (stalking in the second degree) (or) (terroristic threatening) (or) (terroristic act) (or) (stalking or threats against another person's safety under the statutory provisions of any other state jurisdiction)] [or] [(*defendant*) was armed with a deadly weapon or represented by word or conduct that (he) (she) was) so armed].

Definitions

"Course of conduct."—means a pattern of conduct composed of two (2) or more acts separated by at least thirty-six (36) hours but occurring within one year, including without limitation, an act in which a person directly or indirectly or through a third party by any action, method , device, or means follows, monitors, observes, places under surveillance, threatens or communicates to or about another person or interferes with that person's property.

"Emotional distress."—means significant mental suffering or distress, but it does not require that the victim sought or received medical or other professional treatment or counseling.

"Harassment."—A person commits an act of harassment if, with purpose to harass, annoy, or alarm another person, without good cause, he: (1) strikes, shoves, kicks, or otherwise touches a person, subjects him to offensive physical contact or attempts or threatens to do so; or (2) in a public place, directs obscene language or makes an obscene gesture to or at another person in a manner likely to provoke a violent or disorderly response; or (3) follows a person in or about a public place; or (4) in a public place repeatedly insults, taunts, or challenges another in a manner likely to provoke a violent or disorderly response; or (5) engages in conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose; or (6) places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant for no purpose other than to harass, alarm, or annoy.

"Knowingly."—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his

conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Serious bodily injury."—means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

If an instruction is needed for stalking in the third degree, this instruction may be modified by using the first element in this instruction. (See Ark. Code Ann. § 5-71-229 c.)

COMMENT

Ark. Code Ann. § 5-71-229(a).

Constitutionally protected activity is not included within the meaning of "course of conduct." If the defendant claims that he was engaged in a constitutionally protected activity, the court shall determine the validity of that claim as a matter of law, and, if the court finds the claim valid, it shall exclude evidence on that activity.

Stalking in the first degree is a Class C felony.

AMCI 2d 1308-AD STALKING IN THE FIRST DEGREE—AFFIRMATIVE DEFENSE

That he was a law enforcement officer, a licensed private investigator, attorney, process server, licensed bail bondsman, or a store detective acting within the reasonable scope of his duty while conducting a surveillance on an official work assignment.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-71-229(c).

AMCI 2d 1309
STALKING IN THE SECOND DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of stalking in the second degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ (defendant(s)) knowingly engaged in a course of conduct that harassed another person; and

Second: That [he] [they] **made a terroristic threat with the purpose of** [placing that person in imminent fear of (death) (or) (serious bodily injury)] [or] [placing that person in imminent fear of the (death) (or) (serious bodily injury) of his or her immediate family.]

Definitions

"Course of conduct."—means a pattern of conduct composed of two (2) or more acts separated by at least thirty-six (36) hours but occurring within one year including without limitation an act in which the defendant directly or indirectly, or through a third party by any action, method, device, or means follows, monitors, observes, places under surveillance, threatens, or communicates to or abort about a person or interferes with a person's property.

"Harassment."—A person commits an act of harassment if, with purpose to harass, annoy, or alarm another person, without good cause, he: (1) strikes, shoves, kicks, or otherwise touches a person, subjects him to offensive physical contact or attempts or threatens to do so; or (2) in a public place, directs obscene language or makes an obscene gesture to or at another person in a manner likely to provoke a violent or disorderly response; or (3) follows a person in or about a public place; or (4) in a public place repeatedly insults, taunts, or challenges another in a manner likely to provoke a violent or disorderly response; or (5) engages in conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose; or (6) places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant for no purpose other than to harass, alarm, or annoy.

"Immediate family."—means any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household or who, within the prior six (6) months, regularly resided in the household.

"Knowingly."—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purposefully."—A person's acts are purposeful with respect to his conduct when it is his conscious object to engage in the conduct.

"Serious bodily injury."—means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

If an instruction is needed for stalking in the third degree, AMCI 1308 may be modified by using the first element in the instruction. (See Ark. Code Ann. § 5-71-229 c).

COMMENT

Ark. Code Ann. § 5-71-229(b).

Constitutionally protected activity is not included within the meaning of "course of conduct." If the defendant claims that he was engaged in a constitutionally protected activity, the court shall determine the validity of that claim as a matter of law, and, if the court finds the claim valid, it shall exclude evidence on that activity.

Stalking in the second degree is a Class D felony.

[Next Page is 13-45]

AMCI 2d 1309-AD

STALKING IN THE SECOND DEGREE — AFFIRMATIVE DEFENSE

That he was a law enforcement officer, a licensed private investigator, attorney, process service, licensed bail bondsman, or a store detective acting within the reasonable scope of his duty while conducting surveillance on an official work assignment.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-71-229(c).

AMCI 2d 1310

TERRORISTIC THREATENING IN THE FIRST DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of terroristic threatening in the first degree. To sustain this charge the State must prove beyond a reasonable doubt that** _____ *(defendant(s))*, **with the purpose of terrorizing** _____ *(another person)*:

[threatened to cause (death to) (or) (serious physical injury to) (or) (substantial damage to the property of) _____ *(another person)*;]

[or]

[threatened to cause (physical injury) (property damage) to a (teacher) (_____) *(other school employee)* acting in the line of duty.]

Definitions

"Purpose." — A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

"Serious physical injury." — means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-13-301(a)(1). "Serious physical injury" is defined in Ark. Code Ann. § 5-1-102. "Purpose" is defined in Ark. Code Ann. § 5-2-202.

Terroristic threatening in the first degree is a Class D felony.

AMCI 2d 1311

TERRORISTIC THREATENING IN THE SECOND DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of terroristic threatening in the second degree. To sustain this charge the State must prove beyond a reasonable doubt that** _____ *(defendant(s))*, **with the purpose of terrorizing** _____ *(another person)*, **threatened to cause** [physical injury to] [or] [damage to the property of] _____ *(another person)*.

Definitions

"Physical injury." — means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.

"Purpose." — A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-13-301(b)(1). "Physical injury" is defined in Ark. Code Ann. § 5-1-102. "Purpose" is defined in Ark. Code Ann. § 5-2-202.

Terroristic threatening in the second degree is a Class B misdemeanor.

AMCI 2d 1312

TERRORISTIC ACT

_____*(Defendant(s))* [is] [are] **charged with the offense of committing a terroristic act. To sustain this charge the State must prove beyond a reasonable doubt that, while not in the commission of a lawful act and with the purpose of causing injury to [another person or other persons] [or] [damage to property],** _____*(defendant(s))*

[(shot) (projected an object) at a conveyance that was being operated or that was occupied by another person or other persons.]

[or]

[shot at an occupiable structure.]

NOTE ON USE

"Residential occupiable structure" and "commercial occupiable structure" are defined in AMCI 2d 3901 and 3902 respectively. An appropriately tailored definition of "occupiable structure" should be given when requested by counsel or when the court thinks that it would be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-13-310.

Committing a terroristic act is a Class Y or Class B felony.

The defendant in *Brown v. State,* 74 Ark. App. 281, 47 S.W.3d 314 (2001), was convicted of second degree battery and committing a terroristic act after he fired at least nine shots at a vehicle driven by his estranged wife, hitting her twice. The Court of Appeals ruled that the defendant should be convicted of both offenses despite his double jeopardy claims. The decision apparently hinged on the fact that the defendant fired multiple shots, only some of which struck the victim.

(Text continued on page 13–53)

AMCI 2d 1312-EXP

TERRORISTIC ACT — STAGE ONE VERDICT EXPLANATION — MULTIPLE POSSIBLE VERDICTS

If you find _____ *(defendant(s))* **guilty of committing a terroristic act** [or _____ *(lesser included offense)*], **you will so indicate on the verdict form provided you. You will also make a finding about whether** [he] [they], **while committing the terroristic act and with the purpose of causing physical injury to another person, caused** [serious physical injury] [death] **to another person.** [You are further instructed that the following terms have the following meanings:

("Physical injury" means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.)

("Purpose" — A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.)

("Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.)]

If you reach a verdict of not guilty, you will indicate this on the form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1312 and 1312-VF where the evidence affords the jury a rational basis for selecting one verdict from the alternatives set out in 1312-VF. In other cases, use AMCI 2d 8101 and 8301-VF.

COMMENT

"Physical injury" and "serious physical injury" are defined in Ark. Code Ann. § 5-1-102. "Purposely" is defined in Ark. Code Ann. § 5-2-202.

AMCI 2d 1312-VF

TERRORISTIC ACT — STAGE ONE VERDICT FORM — MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* **is guilty of committing a terroristic act.**

_____

FOREMAN

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* is guilty of _____ *(lesser included offense).*

_____

FOREMAN

We, the Jury, find _____ *(defendant)* **not guilty.**

_____

FOREMAN

If your verdict is guilty, you shall complete the following:

Do you, the Jury, find beyond a reasonable doubt that, while committing the terroristic act, _____ *(defendant)*, with the purpose of causing physical injury to another person, caused [serious physical injury] [death] to another person?

YES _____

NO _____

_____

FOREMAN

NOTE ON USE

This verdict form should be used only in conjunction with AMCI 2d 1312-EXP.

If a verdict of guilt is returned, the appropriate standard punishment instruction and verdict form should be used in Stage Two.

AMCI 2d 1313

COERCION

_____ *(Defendant(s))* [is] [are] **charged with the offense of coercion. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant(s))* [compelled] [or] [induced] _____ *(victim)* [to] [not to] _____ *(designated conduct)*, **which** _____ *(victim)* **had the legal right** [not to do] [to do]; **and**

Second: That the conduct of _____ *(defendant(s))* **was purposeful and designed to instill in** _____ *(victim)* **a fear that if the demand was not complied with,** _____ *(defendant(s) or another person)* **would:**

[Cause physical injury to _____ *(anyone)*] [or]

[Cause property damage] [or]

[Subject _____ *(anyone)* to physical confinement] [or]

[Accuse _____ *(anyone)* of an offense] [or]

[Cause criminal proceedings to be instituted against _____ *(anyone)*]

[or]

[Expose a secret or publicize an asserted fact (whether true or false) tending to subject _____ *(anyone)* to hatred, contempt or ridicule].

Definitions

"Physical injury." — means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.

"Purposeful." — A person's acts are purposeful with respect to his conduct when it is his conscious object to engage in the conduct.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-13-208. The word "purposeful" is not defined in the Code. However, "purposely" is defined in Ark. Code Ann. § 5-2-202, with the definition applying to equivalent terms. Ark. Code Ann. § 5-1-102(17). "Physical injury" is defined in § 5-1-102.

Coercion is a Class A misdemeanor.

AMCI 2d 1314

EXPOSING ANOTHER PERSON TO HUMAN IMMUNODEFICIENCY VIRUS

_____ *(Defendant(s))* is charged with the offense of exposing a person to HIV. To sustain this charge the State must prove the following things beyond a reasonable doubt:

First: That _____ *(defendant)* knew that [he] [she] **had tested positive for HIV; and**

Second: With that knowledge, [he] [she] **exposed _____ *(victim)* to the viral infection through** [the parenteral transfer of (blood) (or) (blood products)] [sexual penetration without having informed (him) (her) of the presence of HIV. Sexual penetration does not require the transmission of semen].

Definitions

"HIV" — means the human immunodeficiency virus.

"Parenteral." — means the introduction of a substance into the body by some means other than through the gastrointestinal tract or lungs. Parenteral particularly refers to the introduction of substances by intravenous, subcutaneous, intramuscular, or intermedullary injection.

"Sexual penetration." — means (sexual intercourse) (or) (cunnilingus) (or) (fellatio) (or) (anal intercourse) (or) (any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body).

NOTE ON USE

Because the abbreviation "HIV" is used throughout the instruction, the court should always give the definition of HIV.

COMMENT

Ark. Code Ann. § 5-14-123. "HIV" is defined in § 5-14-123(a). "Sexual penetration" is defined in § 5-14-123(c). The definition of "parenteral" is adapted from ILLUSTRATED STEDMAN'S MEDICAL DICTIONARY (5th unabrid. ed. 1982).

Exposing another person to human immunodeficiency virus (HIV) is a Class A felony.

AMCI 2d 1315
INSTALLING OR MAINTAINING A BOOBY TRAP

_____*(Defendant(s))* [is] [are] **charged with the offense of** [installing] [or] [maintaining] **a booby trap. To sustain this charge, the State must prove beyond a reasonable doubt that**_____**(defendant(s))** [installed] [or] [maintained] [on (his) (their) property] [on another person's property] **a device designed to cause death or serious physical injury to a person.**

Definitions

"Serious physical injury."—means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-73-126. "Serious physical injury" is defined in Ark. Code Ann. § 5-1-102.

Installing or maintaining a booby trap is a Class D felony.

AMCI 2d 1316
UNLAWFUL DISCHARGE OF FIREARM FROM VEHICLE—FIRST DEGREE

_____*(Defendant(s))* [is] [are] **charged with the offense of first degree unlawful discharge of a firearm from a vehicle. To sustain this charge the State must prove beyond a reasonable doubt that** [he] [they]:

(1) **knowingly discharged a firearm from a vehicle; and**

(2) **thereby caused** [death] [serious physical injury] **to**_____**(victim).**

Definitions

"Firearm."—means any device designed, made, or adapted to expel a projectile by the action of an explosive.

"Knowingly."—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Vehicle."—means any craft or device designed for the transportation of people or property across land or water or through the air.

NOTE ON USE

The definitions should be given when requested by counsel or when the court thinks they will be helpful to the jury.

COMMENT

Ark. Code. Ann. § 5-74-107. "Knowingly" is defined at Ark. Code Ann. § 5-2-202; "vehicle" is defined at Ark. Code Ann. § 5-11-101; "firearm" is defined at Ark. Code Ann. § 5-1-102(6).

This offense is a Class Y felony.

AMCI 2d 1317
UNLAWFUL DISCHARGE OF FIREARM FROM VEHICLE—SECOND DEGREE

_____*(Defendant(s))* [is] [are] **charged with the offense of second degree unlawful discharge of a firearm from a vehicle. To sustain this charge the State must prove beyond a reasonable doubt that** [he] [they] **recklessly discharged a firearm from a vehicle in a manner that created a substantial risk of physical injury to** [_____*(another person)*] [another person] [or] [property damage to (a house) (a residence)_____*(an occupiable structure other than house or residence)*].

Definitions

"Firearm."—means any device designed, made, or adapted to expel a projectile by the action of an explosive.

"Physical injury."—means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.

"Recklessly."—A person acts recklessly with respect to attendant circumstances or the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

"Vehicle."—means any craft or device designed for transportation of people or property across land or water or through the air.

NOTE ON USE

The definitions should be given when requested by counsel or when the court thinks they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-74-107. "Firearm" and "physical injury" are defined at Ark. Code Ann. § 5-1-102; "recklessly," at Ark. Code Ann. § 5-2-202. Definitions of "residential occupiable structure" and "commercial occupiable structure" are found in AMCI 2d 3901 and 3902.

This offense is a Class B felony.

In *Hollins v. State,* 80 Ark. App. 342, 96 S.W.3d 755 (2003), a defendant charged with unlawfully discharging a firearm from a vehicle in the second degree argued that he was entitled to a self defense instruction. Held, Ark. Code Ann. § 5-2-614 made the defense unavailable because defendant recklessly or negligently created a substantial risk of injury to a third party.

AMCI 2d 1318
THREATENING TO COMMIT AN ACT OF MASS VIOLENCE ON SCHOOL PROPERTY

_____ *(Defendant(s))* [is] [are] **charged with the offense of threatening to commit an act of mass violence on school property. To sustain this charge, the State must prove beyond a reasonable doubt the following:**

First: That _____ *(defendant(s))* knowingly threatened to commit an act of mass violence on [school property] [or] [at a (curricular) (or) (extracurricular) activity sponsored by a school] by a means of communication; and

Second: That the communicated threat placed a person or group of persons in a position to reasonably fear for their safety.

Definitions

"Knowingly."—A person acts knowingly (or with knowledge) with respect to his conduct or the circumstances that exist at the time of his act when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Mass violence" means physical injury that a reasonable person would conclude could lead to permanent injury, including without limitation permanent physical injury, permanent mental injury, or permanent emotional injury, or death to two or more people.

"School" means a:

(A) Public or private daycare or preschool facility;

(B) Public or private school for students in grades kindergarten through twelve (K-12);

(C) Technical institute or post-secondary vocational-technical school; or

(D) Two-year or four-year college or university.

COMMENT

Ark. Code Ann. § 5-13-302. The definitions of "mass violence" and "school" are found in § 5-13-302. Threatening to commit an act of mass violence on school property is a Class C felony.

CHAPTER 14

SEXUAL OFFENSES

SYNOPSIS

1401. Rape

1401-AD. Affirmative Defense To Rape Or Sexual Assault In The First Degree: Defendant Not More Than Three Years Older than Victim

1402. Sexual Assault In The First Degree

1403. Sexual Assault In The Second Degree

1403-EXP. Sexual Assault In The Second Degree—Stage One Verdict Explanation—Multiple Possible Verdicts

1403-VF. Sexual Assault In The Second Degree—Stage One Verdict Form—Multiple Possible Verdicts

1403-AD. Affirmative Defense To Sexual Assault In The Second Degree: Defendant Under Age 18 And Not More Than Three Or Four Years Older Than Victim

1404. Sexual Assault In The Third Degree

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1406. Video Voyeurism

1407. Voyeurism

1407-EXP Voyeurism Stage One Verdict Explanation—Multiple Possible Verdicts

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1408. Sexual Indecency With A Child

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1401-OBS. Rape

1402-OBS. Carnal Abuse In The First Degree

1403-OBS. Carnal Abuse In The Second Degree

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1405-OBS. Sexual Misconduct

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1407-A-OBS. Sexual Abuse By An Employee Of The Department Of Correction Or The Department Of Community Correction

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1412. Sexual Extortion

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1413–1419. Reserved

1420. Failure To Register As A Sex Offender

(Text continued on page 14-3)

INTRODUCTION TO CHAPTER 14—SEXUAL OFFENSES

The 2001 General Assembly substantially revised Chapter 14 -Sexual Offenses. See Act 1665, Act 1724, Act 1738, and Act 1821. The following instructions should be used for offenses committed on or after August 13, 2001:

Title of offense	Arkansas Code Annotated	AMCI
Rape	§ 5-14-103	AMCI 2d 1401
Age-based affirmative defense	§ 5-14-103(a)(3)(B) § 5-14-110(a)(2)(B) § 5-14-124(c)	AMCI 2d 1401-AD
Sexual assault in the first degree	§ 5-14-124	AMCI 2d 1402
Sexual assault in the second degree	§ 5-14-125	AMCI 2d 1403
Sexual assault in the third degree	§ 5-14-126	AMCI 2d 1404
Sexual assault in the fourth degree	§ 5-14-127	AMCI 2d 1405
Sexual indecency with a child	§ 5-14-110	AMCI 2d 1408

The following instructions were not substantially changed by the 2001 legislation and should be used for offenses committed both before and after August 13, 2001:

Title of offense	Arkansas Code Annotated	AMCI
Public sexual indecency	§ 5-14-111	AMCI 2d 1409
Indecent exposure	§ 5-14-112	AMCI 2d 1410
Mistake of age affirmative defense	§ 5-14-102(c)	AMCI 2d 1411-AD-S
Mistake of mental condition affirmative defense	§ 5-14-102(d)	AMCI 2d 1411-AD-M

Sexual offenses committed prior to August 13, 2001, the effective date of the new legislation, will continue to be prosecuted under former law. The following instructions have been retained at the end of this chapter with the designation "-OBS." They should be used for offenses committed before August 13, 2001.

Title of offense	Former Arkansas Code Annotated	Obsolete AMCI
Rape	§ 5-14-103	AMCI 2d 1401-OBS
Carnal abuse in first degree	§ 5-14-104	AMCI 2d 1402-OBS
Carnal abuse in second degree	§ 5-14-105	AMCI 2d 1403-OBS
Carnal abuse in third degree	§ 5-14-106	AMCI 2d 1404-OBS
Sexual misconduct	§ 5-14-107	AMCI 2d 1405-OBS
Sexual abuse in first degree	§ 5-14-108	AMCI 2d 1406-OBS
Sexual abuse in second degree	§ 5-14-109	AMCI 2d 1407-OBS AMCI 2d 1407-A-OBS
Sexual solicitation of a child	§ 5-14-110	AMCI 2d 1408-OBS
Indecent exposure to child	§ 5-14-112(b)	AMCI 2d 1410-A-OBS
Violation of a minor in first degree	§ 5-14-120	AMCI 2d 1412-OBS
Violation of a minor in second degree	§ 5-14-121	AMCI 2d 1412.1-OBS

AMCI 2d 1401

RAPE

_____ *(Defendant)* **is charged with the offense of rape. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

[**First: That** _____ *(defendant)* **engaged in** (sexual intercourse) (or) (deviate sexual activity) **with** _____ *(victim)* ; **and**

Second: That _____ *(defendant)* did so by forcible compulsion.]

OR

[**First: That** _____ *(defendant)* **engaged in** (sexual intercourse) (or) (deviate sexual activity) **with** _____ *(victim)* ; **and**

Second: That _____ *(victim)* was incapable of consent because (he) (she) was (physically helpless) (mentally defective) (or) (mentally incapacitated).]

OR

[**First: That** _____ *(defendant)* **engaged in** (sexual intercourse) (or) (deviate sexual activity) **with** _____ *(victim)* ; **and**

Second: That _____ *(victim)* was less than 14 years of age at the time of the alleged offense.

(It is no defense to a charge of rape that _____ *(victim)* consented to the conduct.)]

OR

[**First: That** _____ *(defendant)* **engaged in** (sexual intercourse) (or) (deviate sexual activity) **with** _____ *(victim)* ; **and**

Second: That _____ *(victim)* was less than 18 years of age at the time of the alleged offense; and

Third: That _____ *(defendant)* (is)(was) _____ *(victim's)* (guardian) (uncle) (aunt) (grandparent) (step-grandparent) (grandparent by adoption) (brother [of the whole or half blood] [by adoption]) (sister [of the whole or half blood] [by adoption]) (nephew) (niece) (first cousin).

(It is no defense to a charge of rape that _____ *(victim)* consented to the conduct.)]

Definitions

"Deviate sexual activity." — means any act of sexual gratification involving [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Forcible compulsion." — means physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person.

"Guardian." — means a parent, stepparent, legal guardian, legal custodian, foster parent, or anyone who, by virtue of a living arrangement, is placed in an apparent position of power or authority over a minor.

"Mentally defective." — means that a person suffers from a mental disease or defect which renders the person incapable of understanding the nature and consequences of sexual acts or renders the person unaware the sexual act is occurring. A determination that a person is mentally defective shall not be based solely on the person's intelligence quotient.

"Mentally incapacitated." — means that a person (is temporarily incapable of appreciating or controlling (his) (her) conduct) (or) (is unaware the sexual act is occurring) as a result of the influence of a controlled or intoxicating substance administered to the person without the person's consent.

"Physically helpless." — means that a person is unconscious or is physically unable to communicate lack of consent or is rendered unaware the sexual act is occurring.

"Sexual intercourse." — means penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury. If the defendant asserts an age-based affirmative defense, the court should give AMCI 2d 1401-AD. If the defendant asserts an affirmative defense based on mistake of mental condition of the victim, the court should give AMCI 2d 1411-AD-M.

COMMENT

Ark. Code. Ann. § 5-14-103. The definitions are found in § 5-14-101. Rape is a Class Y felony. If the victim is under the age of 14, the minimum sentence is 25 years imprisonment.

Rape by sexual intercourse and rape by deviate sexual activity are the same offense. *See Cokeley v. State*, 288 Ark. 349, 705 S.W.2d 425 (1986), overruling *Clayborn v. State*, 278 Ark. 533, 647 S.W.2d 433 (1983). Consequently, if a person is charged with rape, it may be appropriate to instruct the jury that the state has the burden of proving that the defendant engaged in either sexual intercourse or deviate sexual activity with the victim. *See Wood v. State*, 287 Ark. 203, 697 S.W.2d 884 (1985).

Although "deviate sexual activity" requires an "act of sexual gratification," the state is not required to provide direct proof that an act is done for sexual gratification if it can be assumed that sexual gratification was a plausible reason for the conduct in question. *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993).

(Text continued on page 14-9)

AMCI 2d 1401-AD

AFFIRMATIVE DEFENSE TO RAPE OR SEXUAL ASSAULT IN THE FIRST DEGREE: DEFENDANT NOT MORE THAN THREE YEARS OLDER THAN VICTIM

That _____ *(defendant)* was not more than three years older than _____ *(victim).*

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use. This affirmative defense is applicable to prosecutions under Ark. Code. Ann. § 5-14-103(a)(1)(C) and (D); § 5-14-110(a)(2); or § 5-14-124(a)(3); or § 5-14-126(a)(2).

COMMENT

Ark. Code. Ann. § 5-14-103(a)(1)(C)(ii) and (D)(ii), § 5-14-110(a)(2)(B), § 5-14-124(a)(3)(B), or § 5-14-126(a)(2)(B).

AMCI 2d 1402
SEXUAL ASSAULT IN THE FIRST DEGREE

_____ *(Defendant)* is charged with the offense of sexual assault in the first degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:

Sexual Assault in First Degree under Ark. Code Ann. § 5-14-124(a)(1)(A) & B

[First: That _____ *(defendant)* engaged in (sexual intercourse) (or) (deviate sexual activity) with _____ *(victim)*; and

Second: That _____ *(victim)* was not the spouse of _____ *(defendant)* and

Third: That _____ *(victim)* was less than 18 years of age at the time of the alleged offense; and

(Fourth: That _____ *(defendant)* was at the time of the alleged offense employed with (the Department of Correction) (the Department of Community Correction) (the Department of Human Services) (a city jail) (a county jail) (a juvenile detention facility); and

Fifth: That _____ *(victim)* was at the time of the alleged offense in the custody of (the Department of Correction) (the Department of Community Correction) (the Department of Human Services) (a city jail) (a county jail) (a juvenile detention facility) (or) (its contractors or agents)).]

(Fourth: That _____ *(defendant)* was employed by or contracted with (the Department of Community Correction) (a local law enforcement agency) (a court) (a local government); and

Fifth: That _____ *(defendant)* was supervising the _____ *(victim)* while on (probation) (parole) (or) (for a court-ordered reason).]

[It is no defense to a charge of sexual assault in the first degree that _____ *(victim)* consented to the conduct.]

Sexual Assault in First Degree under Ark. Code Ann. § 5-14-124(a)(1)(C)

[First: That _____ *(defendant)* engaged in (sexual intercourse) (or) (deviate sexual activity) with _____ *(victim)*; and

Second: That _____ *(victim)* was not the spouse of *(defendant)*; and

Third: That _____ *(victim)* was less than 18 years of age at the time of the alleged offense; and

[Fourth: That _____ *(defendant)* was at the time of the alleged offense a _____ *(indicate a mandated reporter listed in Arkansas Code Annotated § 12-18-402(b))*; and

Fifth: That _____ *(defendant)* was at the time of the alleged offense in a position of trust or authority over _____ *(victim)*; and

Sixth: That _____ *(defendant)* used the position to engage in (sexual intercourse) (or) (deviate sexual activity) with _____ *(victim)*.]

[It is no defense to a charge of sexual assault in the first degree that _____ *(victim)* consented to the conduct.]

Sexual Assault in First Degree under Ark. Code Ann. § 5-14-124(a)(1)(D)

[First: That _____ *(defendant)* engaged in (sexual intercourse) (or) (deviate sexual activity) with _____ *(victim)*; and

Second: That _____ *(victim)* was not the spouse of _____ *(defendant)*; and

Third: That _____ *(victim)* was less than 18 years of age at the time of the alleged offense; and

Fourth: That _____ *(defendant)* was at the time of the alleged offense (an employee in _____ *victim's* (school) (school district)) (a temporary caretaker of the _____ *(victim)*) (a person in a position of trust or authority over _____ *(victim)*).]

[It is no defense to a charge of sexual assault in the first degree that _____ *(victim)* consented to the conduct.]

Sexual Assault in First Degree under Ark. Code Ann. § 5-14-124(a)(2)

[First: That (_____ *defendant*) was a teacher, principal, athletic coach, or counselor in a public or private school with grades kindergarten through twelve (K1-12); and

[Second: That _____ (*defendant*) engaged in (*sexual intercourse*) (or) (*deviate sexual activity*) with _____ (*victim*); and

Third: That _____ (*victim*) was not the spouse of _____ (*defendant*); and

Fourth: That _____ (*victim*) was less than 21 years of age at the time of the alleged offense; and

Fifth: That _____ (*victim*) was a student enrolled in the public or private school employing the _____ (*defendant*); and

Sixth: That _____ (*defendant*) was in a position of trust or authority over _____ (*victim*); and

Seventh: That _____ (*defendant*) used the position to engage in (*sexual intercourse*) (or) (*deviate sexual activity*) with _____ (*victim*).]

[It is no defense to a charge of sexual assault in the first degree that (victim) consented to the conduct.]

Definitions

"Deviate sexual activity"—means any act of sexual gratification involving [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or)

(anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Sexual intercourse"—means penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury. If the defendant asserts an age-based affirmative defense, the court should give AMCI 2d 1401-AD.

COMMENT

Ark. Code. Ann. § 5-14-124. The definitions are found in § 5-14-101. Sexual assault in the first degree is a Class A felony.

AMCI 2d 1403
SEXUAL ASSAULT IN THE SECOND DEGREE

_____ *(Defendant)* is charged with the offense of sexual assault in the second degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:

Sexual Assault in Second Degree under Ark. Code Ann. § 5-14-125(a)(1)

[First: That _____ *(defendant)* engaged in sexual contact with _____ *(victim)*; and

Second: That _____ *(defendant)* did so by forcible compulsion.]

Sexual Assault in Second Degree under Ark. Code Ann. § 5-14-125(a)(2)

[First: That _____ *(defendant)* engaged in sexual contact with _____ *(victim)*; and

Second: That _____ *(victim)* was incapable of consent because (he) (she) was (physically helpless) (mentally defective) (or) (mentally incapacitated).]

Sexual Assault in Second Degree under Ark. Code Ann. § 5-14-125(a)(3) or (a)(5)

[First: That _____ *(defendant)* engaged in sexual contact with *(victim)*; and

Second: That _____ *(victim)* was not the spouse of _____ *(defendant)*; and

Third: That _____ *(victim)* was less than 14 years of age at the time of the alleged offense.]

Sexual Assault in Second Degree under Ark. Code Ann. § 5-14-125(a)(4)

[First: That _____ *(defendant)* engaged in sexual contact with _____ *(victim)*; and

Second: That _____ *(victim)* was less than 18 years of age at the time of the alleged offense; and

Third: That _____ *(defendant)* was at the time of the alleged offense employed with (the Department of Correction) (the Department of Community Correction) (city jail) (county jail) (juvenile detention facility); and

Fourth: That _____ *(victim)* was at the time of the alleged offense in the custody of (the Department of Community Correction) (a local law enforcement agency) (a court) (a local government) (at one of the facilities operated by the (agency) (contractor) employing _____ *(defendant)*).]

(Third: That _____ *(defendant)* was employed by or contracted with (the Department of Community Correction) (a local law enforcement agency) (a court) (a local government); and

Fourth: That _____ *(defendant)* was supervising (victim) while on (probation) (parole) (or) (for a court-ordered reason)).]

OR

[First: That _____ *(defendant)* engaged in sexual contact with _____ (victim); and

Second: That _____ *(victim)* was less than 18 years of age at the time of the alleged offense; and

Third: That _____ *(defendant)* was at the time of the alleged offense a *(indicate a mandated reporter listed in Arkansas Code Annotated § 12-18-402(b))*; and

Fourth: That _____ *(defendant)* was at the time of the alleged offense in a position of trust or authority over _____ *(victim)*).]

OR

[First: That _____ *(defendant)* engaged in sexual contact with _____ *(victim)*; and

Second: That _____ *(victim)* was less than 18 years of age at the time of the alleged offense; and

Third: That _____ *(defendant)* was at the time of the alleged offense (_____ *(victim's)* guardian) (an employee in _____ *(victim's)* school or school district) (a temporary caretaker of the _____ *(victim)*) (a person in a position of trust or authority over _____ *(victim)*).]

[It is no defense to a charge of sexual assault in the second degree that _____ *(victim)* consented to the conduct.]

(Note: The instruction that consent is not a defense should be given only in prosecutions under Ark. Code Ann. § 5-14-125(a)(4)).

Sexual Assault in Second Degree under § 5-14-125(a)(6)

[First: That _____ *(defendant)* engaged in sexual contact with _____ *(victim)*; and

Second: That _____ *(defendant)* was at the time of the alleged offense a teacher, principal, athletic coach, or counselor in a public or private school in grades between kindergarten through twelve (K-12); and

Third: That _____ *(victim)* was at the time of the alleged offense a student enrolled in the school in which (defendant) was a (teacher) (principal) (athletic coach) (counselor); and

Fourth: That _____ *(victim)* was less than 21 years of age at the time of the alleged offense; and]

Fifth: That _____ (*defendant*) was in a position of trust or authority over _____ (*victim*); and

Sixth: That _____ (*defendant*) used the position to engage in (*sexual intercourse*) (or) (*deviate sexual activity*) with _____ (*victim*).]

Definitions

"Forcible compulsion"—means physical force or a threat, express or implied,

of death or physical injury to or kidnapping of any person.

"Guardian"—means a parent, stepparent, legal guardian, legal custodian, foster parent, or anyone who, by virtue of a living arrangement, is placed in an apparent position of power or authority over a minor.

"Mentally defective"—means that a person suffers from a mental disease or defect which renders the person incapable of understanding the nature and consequences of sexual acts or renders the person unaware the sexual act is occurring. A determination that a person is mentally defective shall not be based solely on the person's intelligence quotient.

"Mentally incapacitated"—means that a person (is temporarily incapable of appreciating or controlling (his) (her) conduct) (or) (is unaware the sexual act is occurring) as a result of the influence of a controlled or intoxicating substance administered to the person without the person's consent.

"Physically helpless"—means that a person is unconscious or is physically unable to communicate lack of consent or is rendered unaware the sexual act is occurring.

"Sexual contact"—means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, or buttocks, or anus of a person, or the breast of a female.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code. Ann. § 5-14-125. The definitions are found in § 5-14-101. Sexual assault in the second degree, as defined in Ark. Code Ann. § 5-14-125(a)(1), (a)(2), (a)(3), (a)(4), and (a)(6) is a Class B felony. Sexual assault in the second degree, as defined in Ark. Code Ann. § 5-14-125(a)(5), is a Class D felony.

The offense of second-degree sexual assault is not a lesser included offense of rape because it requires proof of two elements that rape does not. *Hartman v. State*, 2015 Ark. 30, 454 S.W.3d 721.

In *Nelson v. State*, 2011 Ark. 429 at 3–4, the Supreme Court stated the following regarding the definition of a "temporary caretaker":

> "Until the legislature defines the term, we must look to the plain meaning of the term, 'temporary caretaker.' 'Temporary' is defined as 'lasting for a time only; existing or continuing for a limited (usually short) time; transitory.' 'Caretaker,' which is also defined as 'caregiver,' means "a person, usually not a parent, who has and exercises custodial responsibility for a child or for an elderly or disabled person."

In *Rowland v. State*, 2017 Ark. App. 415 at 5, the Court of Appeals held that being a babysitter or a chaperone is sufficient to establish a person as a temporary guardian or caretaker. Because the term "temporary caretaker" is not defined by statute, the AMCI instruction did not include a definition of the term, and the

definition in the non-AMCI instruction was a correct statement of law regarding the definition of the term, and the circuit court did not err in giving the non-AMC instruction defining "temporary caretaker."

AMCI 2d 1403-EXP
SEXUAL ASSAULT IN THE SECOND DEGREE—STAGE ONE VERDICT EXPLANATION—MULTIPLE POSSIBLE VERDICTS

If you find _____ *(defendant)* guilty of sexual assault in the second degree, you will so indicate on the verdict form provided to you. You will also make a finding about _____ *(defendant's)* age at the time of the offense.

If you reach a verdict of not guilty, you will indicate this on the form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1403 and 1403-VF where the defendant allegedly engaged in sexual contact with a victim under the age of 14, and the defendant's age at the time of the alleged offense is disputed. *See* Ark. Code Ann. § 5-14-125(a)(3) [engaging in sexual contact with a person under age 14 is a Class B felony if the defendant is 18 years of age or older] and § 5-14-125(a)(5) [engaging in sexual contact with a person under age 14 is a Class D felony if the defendant is less than 18 years of age].

AMCI 2d 1403-VF
SEXUAL ASSAULT IN THE SECOND DEGREE—STAGE ONE
VERDICT FORM—MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* is guilty of sexual assault in the second degree.

_____
FOREMAN

We, the Jury, find _____ *(defendant)* not guilty.

_____
FOREMAN

If your verdict is guilty, you shall complete the following:

Do you, the Jury, find beyond reasonable doubt that _____ *(defendant)* was 18 years of age or older at the time the offense was committed?

YES _____

NO _____

_____
FOREMAN

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1403 and 1403-EXP where the defendant allegedly engaged in sexual contact with a victim under the age of 14, and the defendant's age at the time of the alleged offense is disputed. *See* Ark. Code Ann. § 5-14-125(a)(3) [engaging in sexual contact with a person under age 14 is a Class B felony if the defendant is 18 years of age or older] and § 5-14-125(a)(5) [engaging in sexual contact with a person under age 14 is a Class D felony if the defendant is less than 18 years of age].

AMCI 2d 1403-AD
AFFIRMATIVE DEFENSE TO SEXUAL ASSAULT IN THE SECOND DEGREE: DEFENDANT UNDER AGE 18 AND NOT MORE THAN THREE OR FOUR YEARS OLDER THAN VICTIM

[That _____ *(victim)* was less than 12 years old at the time of the alleged offense and _____ *(defendant)* was not more than 3 years older than _____ *(victim).*]

OR

[That _____ *(defendant)* was less than 18 years old at the time of the alleged offense; that _____ *(victim)* was 12 years of age or older at the time of the alleged offense; and that _____ *(defendant)* was not more than 4 years older than _____ *(victim).*]

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use. This affirmative defense is applicable to prosecutions under Ark. Code Ann. § 5-14-125(a)(5) when the defendant was less than 18 years old at the time of the offense. It is not applicable to prosecutions under Ark. Code Ann. § 5-14-125(a)(3) when the defendant was 18 years of age or older at the time of the offense.

COMMENT

Ark. Code Ann. § 5-14-125(a)(5)(B).

AMCI 2d 1404
SEXUAL ASSAULT IN THE THIRD DEGREE

_____ *(Defendant)* is charged with the offense of sexual assault in the third degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:

Sexual Assault in Third Degree under § 5-14-126(a)(1)(A)

[First: That _____ *(defendant)* engaged in (sexual intercourse) (or) (deviate sexual activity) with _____ *(victim)*; and

Second: That _____ *(victim)* was not the spouse of _____ *(defendant)*; and

Third: That _____ *(defendant)* was at the time of the alleged offense employed with (the Department of Correction) (the Department of Community Correction) (the Department of Human Services) (a city jail) (a county jail);

Fourth: That _____ *(victim)* was at the time of the alleged offense in the custody of (the Department of Correction) (the Department of Community Correction) (the Department of Human Services) (a city jail) (a county jail); and

Fifth: That _____ *(defendant)* was in a position of trust or authority over _____ *(victim)* and used the position of trust or authority to engage in (sexual intercourse) (or) (deviate sexual activity).]

[It is no defense to a charge of sexual assault in the third degree that _____ *(victim)* consented to the conduct.]

Sexual Assault in Third Degree under § 5-14-126(a)(1)(B)

[First: That _____ *(defendant)* engaged in (sexual intercourse) (or) (deviate sexual activity) with _____ *(victim)*; and

Second: That _____ *(victim)* was not the spouse of _____ *(defendant)*; and

Third: That *(defendant)* was employed by or contracted with (the Department of Community Correction) (a local law enforcement agency) (a court) (a local government); and

Fourth: That *(defendant)* was at the time of the alleged offense supervising _____ *(victim)* while on (probation) (parole) (or) (for a court-ordered reason).]

[It is no defense to a charge of sexual assault in the third degree that _____ *(victim)* consented to the conduct.]

Sexual Assault in Third Degree under § 5-14-126(a)(1)(C)

[First: That _____ *(defendant)* was (employed or contracted with) (or) (provided services, supplies, or supervision to) an agency maintaining custody of inmates, detainees, or juveniles;

Second: That _____ *(victim)* was in the custody of (the Department of

Correction) (the Department of Community Correction) (the Department of Human Services) (a city jail) (a county jail); and

Third: That _____ *(defendant)* was in a position of trust or authority over _____ *(victim)* and used the position of trust or authority to engage in (sexual intercourse) (or) (deviate sexual activity).]

Sexual Assault in Third Degree under § 5-14-126(a)(1)(D)

[First: That _____ *(defendant)* engaged in (sexual intercourse) (or) (deviate sexual activity) with _____ *(victim)*; and

Second: That _____ *(victim)* was not the spouse of _____ *(defendant)*; and

Third: That _____ *(defendant)* was at the time of the alleged offense a (indicate a mandated reporter listed in Arkansas Code Annotated § 12-18-402(b)) (member of the clergy); and

Fourth: That _____ *(defendant)* was at the time of the alleged offense in a position of trust or authority over _____ *(victim)*; and

Fifth: That _____ *(defendant)* used the position to engage in (sexual intercourse) (or) (deviate sexual activity) with _____ *(victim)*.]

[It is no defense to a charge of sexual assault in the third degree that _____ *(victim)* consented to the conduct.]

Sexual Assault in Third Degree under § 5-14-126(a)(2)

[First: That _____ *(defendant)* engaged in (sexual intercourse) (or) (deviate sexual activity) with _____ *(victim)*; and

Second: That _____ *(victim)* was not the spouse of _____ *(defendant)*; and

Third: That _____ *(defendant)* was under 18 years of age at the time of the alleged offense; and

Fourth: That _____ *(victim)* was less than 14 years of age at the time of the alleged offense.]

[It is no defense to a charge of sexual assault in the third degree that _____ *(victim)* consented to the conduct.]

Definitions

"Deviate sexual activity"—means any act of sexual gratification involving [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Sexual intercourse"—means penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code. Ann. § 5-14-126. The definitions are found in § 5-14-101. Sexual assault in the third degree is a Class C felony.

(Text continued on page 14-27)

AMCI 2d 1405
SEXUAL ASSAULT IN THE FOURTH DEGREE

_____ *(Defendant)* **is charged with the offense of sexual assault in the fourth degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

[First: That _____ *(Defendant)* **engaged in** (sexual intercourse) (or) (deviate sexual activity) (or) (sexual contact) **with** _____*(victim)*; **and**

Second: That _____ *(Defendant)* **was 20 years of age or older at the time of the alleged offense; and**

Third: That _____ *(victim)* **was less than 16 years of age at the time of the alleged offense; and**

Fourth: That _____ *(victim)* **was not the spouse of** _____ *(Defendant)*.]

[or]

[First: That _____ *(Defendant)* **engaged in sexual contact with** _____ *(victim)*; **and**

Second: That _____ *(victim)* **was not the spouse of** _____ *(Defendant)*; **and**

Third: That _____ *(victim)* **was in the custody of the** (Department of Correction) (Department of Community Correction) (Department of Human Services) (a city or county jail); **and**

Fourth: That _____ *(Defendant)* **was employed by the** (Department of Correction) (Department of Community Correction) (Department of Human Services) (a city or county jail) **at the time of the alleged offense.]**

Definitions

"Deviate sexual activity" — means any act of sexual gratification involving [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Sexual contact" — means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, or buttocks, or anus of a person, or the breast of a female.

"Sexual intercourse" — means penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-14-127(a). The definitions are found in § 5-14-101. Sexual assault in the fourth degree is a Class D felony if the defendant engages in sexual intercourse or deviate sexual activity with the victim or the defendant is found guilty under the second bracketed option involving a custodial relationship. It is a Class A misdemeanor if the defendant only engages in sexual contact with the victim.

AMCI 2d 1405-EXP
SEXUAL ASSAULT IN THE FOURTH DEGREE — STAGE ONE
VERDICT EXPLANATION — MULTIPLE POSSIBLE VERDICTS

If you find _____ *(defendant)* guilty of sexual assault in the fourth degree, you will so indicate on the verdict form provided to you. You will also make a finding about the circumstances of the offense.

If you reach a verdict of not guilty, you will indicate this on the form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1405 and 1405-VF where the exact nature of the defendant's conduct toward the victim is disputed. If the defendant engages in sexual intercourse or deviate sexual activity with the victim, or the defendant is in a custodial relationship with the victim, the conviction is a Class D felony. It is a Class A misdemeanor if the defendant only engages in sexual contact with the victim.

AMCI 2d 1405-VF
SEXUAL ASSAULT IN THE FOURTH DEGREE—STAGE ONE
VERDICT FORM—MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* is guilty of sexual assault in the fourth degree.

_____
FOREMAN

We, the Jury, find _____ *(defendant)* not guilty.

_____
FOREMAN

If your verdict is guilty, you shall complete the following:

Do you, the Jury, find beyond a reasonable doubt that _____ *(defendant)* engaged in (sexual intercourse) (or) (deviate sexual activity) with _____*(victim)*?

YES _____

NO _____

_____
FOREMAN

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1405 and 1405-EXP to determine the exact nature of the defendant's conduct toward the victim. Sexual assault in the fourth degree is a Class D felony if the defendant engages in sexual intercourse or deviate sexual activity with the victim, or the defendant is in a custodial relationship with the victim. It is a Class A misdemeanor if the defendant only engages in sexual contact with the victim.

AMCI 2d 1406
VIDEO VOYEURISM

_____ (Defendant) **is charged with the offense of video voyeurism. To sustain this charge, the State must prove the following things beyond a reasonable doubt:**

[FIRST: that _____ (defendant) **used**

[a camera] [a videotape] [(a photo-optical) (a photoelectric) (or) (an) image recording device] **for the purpose of secretly** [observing] [viewing] [photographing] [filming] [or] [videotaping] _____ (insert victim's name or use term "another person");

SECOND: that _____ (insert victim's name or use term "the person") **was in a private area out of public view in a** [residence] [place of business] [school] [(a structure) (or a room or particular location within the structure)]; and

THIRD: that _____ (insert victim's name or use term "the person") had a **reasonable expectation of privacy and had not consented to the observation.]**

[or]

[FIRST: that _____ (defendant) **knowingly used** [an unmanned vehicle or aircraft] [a camcorder] [a motion picture camera] [a photographic camera] [or] [equipment] **that was** [concealed or disguised] [operated in a manner to escape detection] **to secretly or surreptitiously** [videotape] [film] [photograph] [record] [or] [[view by electronic means] _____ (insert victim's name or use term "a person");

SECOND: that _____ (defendant) **did so for the purpose of viewing any portion of** _____ (insert victim's name or use term "other person's") **body and for which** [(he/she/they) (the other person)] **had a reasonable expectation of privacy; and**

THIRD: that (defendant) did so without the knowledge or consent of (insert victim's name or use term "the other person")

Definitions

"Knowingly."—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purpose."—A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

The victim's name may be inserted in the appropriate blank or a generic term may be used. The language may be modified to fit the situation.

See Ark. Code. Ann. § 5-16-101 (d) for situations for which criminal liability does not apply. If a fact issue exists concerning these situations, then an appropriate instruction should be prepared.

When using the second bracket, if there is an issue for the jury concerning whether the defendant distributed or transmitted the image to another person or posted it on the internet, which takes the offense from a Class B to a Class A misdemeanor, then an appropriate instruction should be prepared, such as modifying AMCI 2d 1407-EXP and AMCI 2d 1407-VF, and asking: ["Do you, the Jury find beyond a reasonable doubt that _____ (defendant) (distributed to another person) (transmitted to another person) (posted on the internet in a format accessible by another person) the (video recording) (film) (photo)"?]

COMMENT

Ark. Code. Ann. § 5-16-101. "Purpose" and "knowingly" are defined in Ark. Code. Ann. § 5-2-202.

Commission of the first bracketed alternative is a Class D felony, but a third or subsequent offense is a Class C felony. Commission of the second bracketed alternative is a Class B misdemeanor; however, it is a Class A misdemeanor if the defendant distributed or transmitted the video recording, film, or photo to another person or posted the video recording, film, or photo on the internet, or has previously been convicted of section 5-16-101 or 102.

Ark. Code Ann. § 5-16-101 (d) provides that it is not illegal to video or observe in the following situations: (a) pursuant to a court order; (b) security monitoring for a residence, place of business, school, public transit vehicle, or correctional facility; (c) video recording or monitoring conducted by a law enforcement officer in official duty; or (d) videotaping pursuant to Ark. Code Ann. § 12-18-615 (b) [medical purposes for child maltreatment].

AMCI 2d 1407
VOYEURISM

_____ (Defendant) **is charged with the offense of voyeurism. To sustain this charge, the State must prove the following things beyond reasonable doubt**:

[**First: that** _____ (defendant) (personally) (or) (through the use of an unmanned vehicle or aircraft) **looked into a private place that is or is a part of a public accommodation;**

Second: that the private place is a place in which a person may reasonably be expected to be nude or partially nude;

Third: that each person who was present did not consent to _____ 's (defendant's) **looking into the private place; and**

Fourth: that _____ (defendant) **did so knowingly and with the purpose to arouse or gratify** (his/her) **sexual desires.**]

[or]

[**First: that** _____ (defendant) **entered** (personally) (or) (through the use of an unmanned vehicle or aircraft) (_____'s) [insert victim's name or use term "another person's"] **private property without** (his/her/its/their) **consent;**

Second: that _____ (defendant) **looked into** _____ (insert victim's name or use term "another person's") **dwelling unit with the purpose to intrude upon or interfere with** (_____ 's) [insert victim's name or use term "the person's"] **privacy**;

Third: that: _____ (defendant) **looked into a part of the dwelling in which** _____ (insert victim's name or use term "a person") **was present**;

Fourth: that _____ (insert victim's name or use term "the person who was present") **had a reasonable expectation of privacy in that part of the dwelling;**

Fifth: that _____ (insert victim's name or use term "the person who was present") **did not consent to** _____ 's (defendant's) **looking into that part of the dwelling; and**

Sixth: that _____ (defendant) **did so knowingly and with the purpose to arouse or gratify** (his/her) **sexual desires.**]

Definitions

"Knowingly."—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Nude or partially nude person" means any person who has less than a fully

opaque covering over the genitals, pubic area, buttocks or breasts of a female.

"Private place" means a place where a person may reasonably expect to be safe from being observed without his or her knowledge and consent.

"Public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility where goods, services, facilities, privileges, advantages, or accommodations are offered, sold, or otherwise made available to the public.

"Purpose."—A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

The victim's name may be inserted in the appropriate blank or a generic term may be used. The language may be modified to fit the situation.

This instruction should be used in conjunction with AMCI 2d 1407-EXP and 1407-VF where the defendant allegedly engaged in voyeurism while he held a position of trust or authority over a victim who was under the age of seventeen, and these issues are disputed. See Ark. Code. Ann. § 5-16-102 (c)(2) (If a victim is under seventeen (17) years of age and the person who commits the offense holds a position of trust or authority over the victim, the violation is a Class D felony).

COMMENT

Ark. Code. Ann. § 5-16-102. "Nude or partially nude person," "private place," and "public accommodation," are defined in § 5-16-102 (a). "Purpose" and "knowingly" are defined in Ark. Code. Ann. § 5-2-202.

Voyeurism is a Class A misdemeanor unless the victim is under seventeen (17) years of age and the person who commits the offense holds a position of trust or authority over the victim, or the person has previously been convicted of an offense under Sections 5-16-102 or 101 in which case the violation is a Class D felony.

(Text continued on page 14-37)

AMCI 2d 1407-EXP
VOYEURISM STAGE ONE VERDICT EXPLANATION — MULTIPLE POSSIBLE VERDICTS

If you find (defendant) guilty of voyeurism, you will so indicate on the verdict form provided to you. You will also make additional findings about the offense.

If you reach a verdict of not guilty, you will indicate this on the form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1407 and 1407-VF where the defendant allegedly engaged in voyeurism while he held a position of trust or authority over a victim who was under the age of seventeen, and these issues are disputed. See Ark. Code. Ann. § 5-16-102 (c)(2) (If a victim is under seventeen (17) years of age and the person who commits the offense holds a position of trust or authority over the victim, the violation is a Class D felony).

AMCI 2d 1407-VF
VOYEURISM STAGE ONE VERDICT FORM—MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* is guilty of voyeurism.

_____
FOREMAN

We, the Jury, find _____ *(defendant)* not guilty.

_____
FOREMAN

If your verdict is guilty, you shall complete the following:

Do you, the Jury, find beyond a reasonable doubt that _____ *(defendant)* held a position of trust or authority over _____ *(victim)* at the time the offense was committed?

YES _____

NO _____

_____
FOREMAN

Do you, the Jury, find beyond a reasonable doubt that _____ *(victim)* was under the age of seventeen at the time the offense was committed?

YES _____

NO _____

_____
FOREMAN

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 1407 and 1407-EXP where the defendant allegedly engaged in voyeurism while he held a position of trust or authority over a victim who was under the age of seventeen, and these issues are disputed. See Ark. Code. Ann. § 5-16-102 (c)(2) (If a victim is under seventeen (17) years of age and the person who commits the offense holds a position of trust or authority over the victim, the violation is a Class D felony).

AMCI 2d 1408
SEXUAL INDECENCY WITH A CHILD

_____ *(Defendant)* **is charged with the offense of sexual indecency with a child. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

[First: That _____ *(defendant)* solicited _____ *(victim)* to engage in (sexual intercourse) (or) (deviate sexual activity) (or) (sexual contact);

Second: That _____ *(defendant)* was 18 years old or older at the time of the alleged offense; and

Third: That _____ *(victim)* was (less than 15 years of age) (represented to be less than 15 years of age) at the time of the alleged offense.]

[First: That _____ *(defendant)* purposely exposed (his) (her) sex organs to _____ *(victim)*;

Second: That _____ *(victim)* was less than 15 years of age at the time of the alleged offense; and

Third: That _____ *(defendant)* did so with the purpose to arouse or gratify the sexual desires of (himself) (herself) (or) (another person).]

[(First: That _____ *(defendant)* was employed with (the Department of Correction) (the Department of Community Correction) (a city or county jail, or a juvenile detention facility) and *(victim)* was in custody at a facility operated by (insert agency or contractor employing the defendant)); (or)

(First: That _____ *(defendant)* was a (insert mandated reporter listed under Ark. Code Ann. § 12-18-402(b) and was in a position of trust or authority over (victim)); (or)

(First: That _____ *(defendant)* was (_____ *(victim's)* parent or guardian) (employed in _____ *(victim's)* school or school district) (_____ (victim's temporary caretaker) (in a position of trust and authority over _____*(victim)*);

Second: That _____ *(victim)* was less than 18 years of age at the time of the alleged offense;

Third: That _____ *(defendant)* purposely exposed (his) (her) sex organs to *(victim)*; and

Fourth: That _____ *(defendant)* did so with the purpose to arouse or gratify the sexual desires of (himself) (herself) (or) (another person).]

[(First: That _____ *(defendant)* was employed with (the Department of Correction) (the Department of Community Correction) (a city or county jail, or a juvenile detention facility) and (victim) was in custody at a facility operated by _____ (insert agency or contractor employing the defendant); (or)

[(First: That _____ *(defendant)* was employed by or contracted with (the Department of Community Correction) (a local law enforcement agency) (a

court) (a local government) and was supervising (victim) while on (probation) (parole) (or) (for a court-ordered reason); (or)

[(First: That _____ *(defendant)* was a _____ (insert mandated reporter listed under Ark. Code Ann. § 12-18-402(b) and was in a position of trust or authority over _____ *(victim)*; (or)

(First: That _____ *(defendant)* was (_____ (*victim's*) parent or guardian) (employed in _____ (victim's) school or school district) (_____ (*victim's*) temporary caretaker) (in a position of trust or authority over_____ (*victim*));

Second: That _____ *(defendant)* was 18 years old or older at the time of the alleged offense;

Third: That _____ *(defendant)* purposely caused or coerced _____ *(victim)* to expose his or her sex organs to (defendant) (or) (another person);

Fourth: That _____ *(victim)* was less than 18 years of age at the time of the alleged offense; and

Fifth: That _____ *(defendant)* did so with the purpose to arouse or gratify the sexual desires of (himself) (herself) (or) (another person).]

[First: That _____ *(defendant)* (caused) (or) (coerced) _____ (*victim*) to expose (his) (her) (sex organs) (or) (breasts);

Second: That _____ *(defendant)* was 18 years old or older at the time of the alleged offense;

Third: That _____ *(victim)* was less than 14 years of age at the time of the alleged offense; and

Fourth: That _____ *(defendant)* did so with the purpose to arouse or gratify the sexual desires of (defendant) (or) (another person).]

Definitions

"Deviate sexual activity" means any act of sexual gratification involving: [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Purpose."—A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

"Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person, or the breast of a female.

"Sexual intercourse" means the penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

Use AMCI 2d 1401-AD if the affirmative defense that the defendant is within three years of age of the victim is applicable. Ark. Code. Ann. § 5-14-110 (a)(2)(B).

COMMENT

Ark. Code. Ann. § 5-14-110. The definitions are found in Ark. Code. Ann. § 5-14-101. Sexual indecency with a child is a Class D felony.

Sexual indecency with a child is not a lesser-included offense of rape. *Pratt v. State*, 359 Ark. 16, 194 S.W. 3d 183 (2004).

Sexual indecency with a child is not a lesser included offense of sexual assault in the first degree. *Halliday v. State*, 2011 Ark. App. 544, 386 S.W. 3d 51 (2011).

This instruction was revised to reflect the changes set out in Act 18 of the Third Extraordinary Session of 2016. This Act was in response to *State v. Coble*, 2016 Ark. 114.

(Text continued on page 14-43)

AMCI 2d 1409
PUBLIC SEXUAL INDECENCY

_____ *(Defendant(s))* [is] [are] **charged with the offense of public sexual indecency. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ **(defendant(s)) engaged in an act of** [sexual intercourse] [or] [deviate sexual activity] [or] [sexual contact]; **and**

Second: That [he] [they] **did so in a public place or public view.**

Definitions

"Deviate sexual activity"—means any act of sexual gratification involving: [The penetration, however slight, of the (mouth) (or) (anus) of one person by the penis of another person;] [The penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Public place"—means a publicly or privately owned place to which the public or substantial numbers of people have access.

"Public view"—means observable or likely to be observed by a person in a public place.

"Sexual contact"—means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person, or the breast of a female.

"Sexual intercourse"—means the penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-14-111. Definitions are found in § 5-14-101.

Public sexual indecency is a Class A misdemeanor.

[Next Page is 14-44.3]

AMCI 2d 1410
INDECENT EXPOSURE

_____ *(Defendant)* **is charged with the offense of indecent exposure. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That_____(defendant) exposed his sex organs [in a public place or public view] [or] [under circumstances in which he knew his conduct was likely to cause affront or alarm to others]; **and**

Second: That he did so with the purpose to arouse or gratify the sexual desires of himself or any other person.

Definitions

"Public place." — means a publicly or privately owned place to which the public or substantial numbers of people have access.

"Public view." — means observable or likely to be observed in a public place.

"Purpose." — A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury. When a defendant has four or more previous convictions, refer to Chapters 92 and 93 and modify appropriate instructions.

COMMENT

Ark. Code Ann. § 5-14-112. "Public place" and "public view" are defined in Ark. Code Ann. §5-14-101. "Purpose" is defined in Ark. Code Ann. § 5-2-202.

Indecent exposure is a Class A misdemeanor except it is enhanced to a Class D felony if a defendant has four or more previous convictions within 10 years and to a Class C felony for six or more previous convictions within 10 years.

(Text continued on page 14-45)

AMCI 2d 1411-AD-S

SEXUAL OFFENSES —AFFIRMATIVE DEFENSE: MISTAKE OF AGE OF VICTIM

That at the time of the offense charged _____ *(defendant)* (was under the age of 20 years and) reasonably believed that _____ *(victim)* **was** _____ *(critical age)* **years of age or older.**

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use. This affirmative defense is available (1) when the defendant was under the age of 20 years at the time of the offense and the criminality of conduct depends on a child being under the age of 14 years.; or (2) regardless of the defendant's age, when the criminality of conduct depends on the victim being below an age older than 14 years. It may be applicable to prosecutions under Ark. Code Ann. § 5-14-124, § 5-14-125(a)(3) to (5), and § 5-14-127. Because the defendant can be convicted of any lesser offense defined by the age that the defendant believed the victim to be, an instruction on a lesser offense may be appropriate when AMCI 2d 1411-AD-S is given.

COMMENT

Ark. Code. Ann. § 5-14-102(b), (c), and (d).

AMCI 2d 1411-AD-M

SEXUAL OFFENSES — AFFIRMATIVE DEFENSE: MISTAKE OF MENTAL CONDITION OF VICTIM

That at the time of the offense charged _____ *(defendant)* reasonably believed that _____ *(victim)* was capable of consent.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use. This affirmative defense is available when the criminality of conduct depends on the victim being incapable of consent because the victim is mentally defective or mentally incapacitated. Consequently, it is applicable to prosecutions under Ark. Code. Ann. § 5-14-103(a)(2) or § 5-14-125(a)(2).

COMMENT

Ark. Code. Ann. § 5-14-102(d).

AMCI 2d 1401–OBS

RAPE

_____ *(Defendant)* **is charged with the offense of rape. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant)* **engaged in** (sexual intercourse) (or) (deviate sexual activity) **with** _____ *(victim);* **and**

[**Second:** That (he) (they) did so by forcible compulsion.]

[That _____ *(victim)* was incapable of consent because she was (physically helpless).]

[That _____ *(victim)* was at the time of the alleged offense less than 14 years old.]

[That _____ *(victim)*was

(1) less than 16 years old; AND

(2) incapable of consent due to being mentally defective or mentally incapacitated; AND

(3) not _____*(defendant)*'s spouse.]

[That_____ *(victim)* was

(1) a (patient) (or) (resident) of a (hospital) (nursing home) (human development center) (or) (other similar facility); AND

(2) incapable of consent due to being (mentally defective) (or) (mentally incapacitated); AND

(3) not _____*(defendant)*'s spouse.]

Definitions

"Deviate sexual activity" means any act of sexual gratification involving [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Forcible compulsion" means physical force or a threat, express or implied, of death or serious physical injury to or kidnapping of any person.

"Mentally defective" means that a person suffers from a mental disease or defect which renders the person incapable of understanding the nature and consequences of sexual acts. A determination that a person is mentally defective shall not be based solely on the person's intelligence quotient.

"Mentally incapacitated" means that a person is temporarily incapable of appreciating or controlling (his) (her) conduct as a result of the influence

of a controlled or intoxicating substance administered to the person without the person's consent.

"Physically helpless" means that a person is unconscious or is physically unable to communicate lack of consent.

"Sexual intercourse" means the penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that it would be helpful to the jury.

COMMENT

Ark. Code Ann. § 5–14–103. The definitions are found in § 5–14–101.

Where the charge stems from the victim's being less than 14 years old, it may be appropriate to give AMCI 2d 1401–AD, providing an affirmative defense.

Rape is a single offense defined as sexual intercourse or deviate sexual activity by forcible compulsion. *Cokely v. State,* 288 Ark. 346, 705 S.W.2d 425 (1986), overruling *Clayborn v. State,* 278 Ark. 533, 647 S.W.2d 433 (1983), holding that rape by intercourse and rape by deviate sexual activity were different crimes.

The State is not required to provide direct proof that an act is done for sexual gratification if it can be assumed that sexual gratification is a plausible reason for the conduct in question. *Warren v. State,* 314 Ark. 192, 862 S.W.2d 222 (1993).

Rape is a Class Y felony.

AMCI 2d 1402–OBS

CARNAL ABUSE IN THE FIRST DEGREE

_____ *(Defendant)* **[is][are] charged with the offense of carnal abuse in the first degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant)* **engaged in** [sexual intercourse] [or] [deviate sexual activity] **with** _____ *(victim);*

Second: That _____ *(defendant)* **[was] [were] at the time if the alleged offense 17 years old or younger; [and]**

Third: That _____ *(victim)* **was at the time of the alleged offense less than 14 years old; [and]**

[Fourth: That _____ *(victim)* was not the spouse of _____((*defendant*)).

Definitions

"Deviate sexual activity" means any act of sexual gratification involving [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Sexual intercourse" means the penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they would be helpful to the jury. The bracketed fourth paragraph should be used when the evidence raises an issue as to whether the victim was the spouse of the defendant.

Where there is an age-based affirmative defense, use AMCI 2d 1401-AD.

COMMENT

Ark. Code. Ann. § 5-14-104. The definitions are found in § 5-14-101.

Carnal abuse in the first degree is not a lesser included offense of rape. *Kester v. State*, 303 Ark. 303, 797 S.W. 2d 604 (1990) citing *Sullivan v. State*, 289 Ark. 323, 711 S.W2d 469(1986).

Carnal abuse in the first degree is a Class A felony.

AMCI 2d 1403–OBS

CARNAL ABUSE IN THE SECOND DEGREE

_____ *(Defendant(s))* [is] [are] charged with the offense of carnal abuse in the second degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:

[First: That _____ *(defendant(s))* engaged in [sexual intercourse] [or] [deviate sexual activity] with _____ *(victim)*; [and]

Second: That _____ *(victim)* was incapable of consent because:

[she was mentally defective;] [and] [or]

[she was then mentally incapacitated; (and)]

[Third: that _____ *(victim)* was not the spouse of _____ *(defendant)*.]

Definitions

"Deviate sexual activity" means any act of sexual gratification involving: [The penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person;] [The penetration, however slight, of the (labia mojora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Mentally defective" means that a person suffers from a mental disease or defect which renders the person incapable of understanding the nature and consequences of sexual act. A determination that a person is mentally defective shall not be based solely on the person's IQ.

"Mentally incapacitated" means that a person is temporarily incapable of appreciating or controlling his conduct as a result of the influence of a controlled or intoxicating substance administered to the person without his consent.

"Sexual intercourse" means the penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they would be helpful to the jury. The bracketed third paragraph should be used when the evidence raises an issue as to whether the victim was the spouse of the defendant.

COMMENT

Ark. Code. Ann. § 5-14-105, as amended by 1995 Ark. Acts 1313. Definitions are found in § 5-14-101.

Carnal abuse in the second degree is a Class C felony.

AMCI 2d 1404–OBS

CARNAL ABUSE IN THE THIRD DEGREE

_____ *(Defendant(s))* **is charged with the offense of carnal abuse in the third degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant)* **engaged in** [sexual intercourse] [or] [deviate sexual activity] **with** _____ *(victim)*

[Second: That _____ *(defendant(s))* **[was] [were] at the time of the alleged offense 20 years old or older;**[and]

[Third: That _____ *(victim)* **was at the time of the alleged offense less than 16 years old;** [and]

Fourth: That _____ *(victim)* was not the spouse of _____ *(defendant)* .

Definitions

"Deviate sexual activity" means any act of sexual gratification involving [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Sexual intercourse" means penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they would be helpful to the jury. The bracketed fourth paragraph should be used when the evidence raises an issue as to whether the victim was the spouse of the defendant.

COMMENT

Ark. Code. Ann. § 5-14-106, as amended by 1995 Ark. Acts 1313. The definitions are found in § 5-14-101. Carnal abuse in the third degree is a Class D felony.

AMCI 2d 1405–OBS

SEXUAL MISCONDUCT

_____ *(Defendant(s))* **[is] [are]charged with the offense of sexual misconduct. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant(s))* **engaged in** [sexual intercourse] [or] [deviate sexual activity] **with** _____ *(victim)*; [and]

Second: That _____ *(victim)* **at the time of the alleged offense was less than 16 years old;** [and]

[Third: That _____ *(victim)* **was not the spouse of** _____ *(defendant).*

Definitions

"Deviate sexual activity" means any act of sexual gratification involving [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Sexual intercourse" means the penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they would be helpful to the jury.The bracketed third paragraph should be used when the evidence raises an issue as to whether the victim was the spouse of the defendant.

COMMENT

Ark. Code. Ann. § 5-14-107. Definitions are found in § 5-14-101. Sexual misconduct is a Class B misdemeanor.

AMCI 2d 1406–OBS

SEXUAL ABUSE IN THE FIRST DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of sexual abuse in the first degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant(s))* **engaged in an act of sexual contact with** _____ *(victim)*; and

Second:that (he) (they) did so by forcible compulsion.
That _____ *(victim)* was incapable of consent because she was physically helpless.

Second:That _____ *(defendant(s))* (was) (were) 18 years old or older;
(and)
Third:That _____ *(victim)* was 13 years old or younger; and
Fourth:That _____ *(victim)* was not the spouse of _____ *(defendant)*

Second: That _____ *(victim)* **was 15 years old or younger; and**
Third: That _____ *(victim)* was incapable of consent due to being mentally incapacitated.

Second: That _____ *(victim)* was
(1) a (patient) (or) (resident) of a (hospital) (nursing home) (human development center) (or) (other similar facility); and
(2) incapable of consent due to being (mentally defective) (or) (mentally incapacitated); and
(3) not _____ *(defendant's)* spouse.

Definitions

"Deviate sexual activity" means any act of sexual gratification involving: [The penetration, however slight, of the (mouth) (or) (anus) of one

person by the penis of another person;] [The penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Forcible compulsion" means physical force or a threat, express or implied, of death or serious physical injury to or kidnapping of any person.

"Mentally defective" means that a person suffers from a mental disease or defect which renders the person incapable of understanding the nature and consequences of sexual acts. A determination that a person is mentally defective shall not be based solely on the person's intelligence quotient.

"Mentally incapacitated" means that a person is temporarily incapable of appreciating or controlling (his) (her) conduct as a result of the influence of a controlled or intoxicating substance administered to the person without the person's consent.

"Physically helpless" means that a person is unconscious or is physically unable to communicate lack of consent.

"Sexual intercourse" means the penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they would be helpful to the jury.The bracketed fourth paragraph should be used when the evidence raises an issue as to whether the victim was the spouse of a defendant.

COMMENT

Ark. Code. Ann. § 5-14-108. Definitions are found in § 5-14-101. Sexual abuse in the first degree is a Class C felony.

AMCI 2d 1407–OBS

SEXUAL ABUSE IN THE SECOND DEGREE

_____ *(Defendant(s))* [is] [are] charged with the offense of sexual abuse in the second degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:

[First: That _____*(defendant(s))* engaged in sexual contact with _____*(victim)*; [and]

Second: That _____*(victim)* was incapable of consent because;
(She was then mentally defective;)(and)(or)
(She was then mentally incapacitated; [and])
(Third: that _____ *(victim)* was not the spouse of
_____*(defendant)*.)

Second: That _____
(defendant) (was) (were) 17 years or younger; and
Third: That _____ *(victim)* was 13 years old or younger; (and)
(Fourth: That _____ *(defendant)* was not the spouse of
_____*(victim)*

OR

First: that _____ *(defendant)* ([was] [were] [an] employee[s]) (or) (employed through contract) with (the Arkansas Department of Correction) (the Arkansas Department of Community Correction); and

Second: that _____ *(defendant(s))* engaged in sexual contact for the purpose of sexual gratification with (_____*(victim)*) any person in the custody of [The Department of Correction] [the Deparment of Community Correction]; the consent of the person in custody notwithstanding.

Definitions

"Mentally defective" means that a person suffers from a mental disease or defect which renders the person incapable of understanding the nature and consequences of sexual acts. A determination that a person is mentally defective shall not be based solely on the person's IQ.

"Mentally incapacitated" means that a person is temporarily incapable of appreciating or controlling his conduct as a result of the influence of a controlled or intoxicating substance administered to the person without his consent.

"Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, or buttocks, or anus of a person, or the breast of a female.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they would be helpful to the jury.The bracketed third paragraph should be used when the evidence raises an issue as to whether the victim was the spouse of the defendant.

Where there is an age-based affirmative defense, use AMCI 2d 1401-AD

COMMENT

Ark. Code. Ann. § 5-14-109. Definitions are found in § 5-14-101. Sexual abuse in the second degree is a Class A misdemeanor.

AMCI 2d 1407–A–OBS

SEXUAL ABUSE BY AN EMPLOYEE OF THE DEPARTMENT OF CORRECTION OR THE DEPARTMENT OF COMMUNITY CORRECTION

_____ *(Defendant)* **[is] [are]** charged with the offense of sexual abuse by an employee of the Arkansas Department of **[Correction] [Community Correction]**. To sustain this charge the State must prove the following things beyond a reasonable doubt:

First: That _____ *(defendant(s))* [was] [were] [an] employee[s] [or] [employed through contract] with the Arkansas Department of [Correction] [Community Correction]; and

Second: That _____ *(defendant(s))* engaged in sexual contact for the purpose of sexual gratification with any person in the custody of the Arkansas Department of **[Correction] [Community Correction]**, with or without the consent of the person in custody.

Definitions

"Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person, or the breast of a female.

NOTE ON USE

The definition of "sexual contact" should be given when requested by counsel or when the court feels that it would be helpful to the jury.

COMMENT

Ark. Code A.. §5–14–109. The definition is found in §5–14–101. This offense is a Class A misdemeanor.

AMCI 1408–OBS

SEXUAL SOLICITATION OF A CHILD

_____ *(Defendant)* [is] [are] **charged with the offense of sexual solicitation of a child. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant(s))* **solicited** _____(victim) **to engage in** [sexual intercourse] [or] [deviate sexual activity] [or] [sexual contact];

Second: That _____ *(defendant(s))* [was] [were] **at the time of the alleged offense 18 years or older;** [and]

Third: That _____ *(victim)* **was at the time of the alleged offense less than 14 years old;** [and]

[Fourth: That _____ *(victim)* was not the spouse of _____(defendant).]

Definitions

"Deviate sexual activity" means any act of sexual gratification involving: [The penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person;] [The penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person, or the breast of a female.

"Sexual intercourse means the penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they would be helpful to the jury. The bracketed fourth paragraph should be used when the evidence raises an issue as to whether the victim was the spouse of a defendant.

COMMENT

Ark. Code. Ann. § 5-16-110. Definitions are found in § 5-14-101. Sexual solicitation of a child is a Class D felony.

AMCI 2d 1410-A-OBS
INDECENT EXPOSURE TO CHILD

_____ *(Defendant)* is charged with the offense of indecent exposure to a child. To sustain this charge the State must prove the following things beyond a reasonable doubt:

First: That _____ *(defendant)* purposefully exposed his sex organs;

Second: That _____ *(victim)* was under the age of twelve years;

and

Third: That _____ *(defendant)* did so with the purpose to arouse or gratify the sexual desires of himself or any other person.

Definitions

"Purpose."—A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it would be helpful.

COMMENT

Ark. Code Ann. § 5-14-112(b). "Purpose" is defined in Ark. Code Ann. § 5-2-202.

Indecent exposure to a person under the age of twelve is a Class D felony.

AMCI 2d 1412
SEXUAL EXTORTION

_____ *(Defendant)* is charged with the offense of sexual extortion. To sustain this charge the State must prove the following things beyond a reasonable doubt:

[First: That _____ (*Defendant*) communicated a threat to

(damage the property) (or) (harm the reputation) of another person) (or)

(produce or distribute a recording of the other person (engaged in sexually explicit conduct) (or) (depicted in a state of nudity); and

Second: That _____ (*Defendant*) did so with the purpose to coerce another person to engage in sexual contact or sexually explicit conduct.]

[First: That _____ (*Defendant*) communicated a threat to

(damage the property) (or) (harm the reputation) of another person) (or)

(produce or distribute a recording of the other person (engaged in sexually explicit conduct) (or) (depicted in a state of nudity)); and

Second: That _____ (*Defendant*) did so with the purpose to produce or distribute a recording of a person in a state of nudity or engaged in sexually explicit conduct.]

[First: That _____ (*Defendant*) knowingly caused another person (to engage in sexual contact or sexually explicit conduct) (or) (to produce or distribute a recording of a person in a state of nudity or engaged in sexually explicitly conduct); and

Second: That _____ (*Defendant*) did so by communicating a threat to

(damage the property) (or) (harm the reputation of another person) (or)

(produce or distribute a recording of another person engaged in sexually explicit conduct or depicted in a state of nudity).]

Definitions

"Recording" includes without limitation an image or video.

"Sexually explicit conduct" means actual or simulated:

(A) Sexual intercourse (including genital-genital; oral-genital; anal-genital; or oral-anal, whether between persons of the same or opposite sex);

(B) Deviate sexual activity;

(C) Bestiality;

(D) Masturbation;

(E) Sadomasochistic abuse for the purpose of sexual stimulation; or

(F) Lewd exhibition of the:

(i) Genitals or pubic area of any person; or

(ii) Breast of a female.

"Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person, or the breast of a female.

"State of Nudity" means:

(A) The appearance of a human anus, human genitals, or a female breast below a point immediately above the top of the areola; or

(B) A state of dress that fails to opaquely cover a human anus, human genitals, or a female breast below a point immediately above the top of the areola.

"Knowingly."—A person acts knowingly with respect to the results of his conduct when he is aware that it is practically certain that his conduct will cause such results.

"Purpose."—A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code. Ann. § 5-14-113. Sexual extortion is a Class B felony.

"Purpose" and "knowingly" are defined in Ark. Code Ann. § 5-2-202. "Recording" is defined in § 5-14-113. "Sexually explicit conduct" is defined in § 5-27-302, "state of nudity" in § 5-26-302, and "sexual contact" in § 5-14-101.

(Text continued on page 14-75)

AMCI 2d 1412–OBS

VIOLATION OF A MINOR IN THE FIRST DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of violation of a minor in the first degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant(s))* **engaged in** [sexual intercourse] [or] [deviate sexual activity] **with** _____ *(victim)*; **AND**

Second: That _____ *(victim)* **was more than 13 years old but less than 18 years old; AND**

Third: That _____ *(defendant(s))* [was] [were]

[_____ *(victim)*'s guardian(s)]

[an employee in _____ *(victim)*'s (school) (school district)]

[temporary caretaker or person in a position of trust or authority over _____ *(victim)*]; [AND]

[Fourth: That _____ *(victim)* was not the spouse of _____ *(defendant)*.]

Definitions

"Deviate sexual activity" means any act of sexual gratification involving: [The penetration, however slight,of the (mouth) (or) (anus) of one person by the penis of another person;] [The penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Sexual intercourse" means the penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that it would be helpful to the jury. The bracketed fourth paragraph should be used when the evidence raises an issue as to whether the victim was the spouse of a defendant.

COMMENT

Ark. Code Ann. § 5-14-120. Definitions are found in § 5-14-101. Violation of a minor in the first degree is a Class C felony.

AMCI 2d 1412.1-OBS
VIOLATION OF A MINOR IN THE SECOND DEGREE

_____ *(Defendant(s))* [is] [are] **charged with the offense of violation of a minor in the second degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That_____(defendant(s)) engaged in sexual contact with_____(victim);

AND

Second: That_____(victim) was more than 13 years old but less than 18 years old; AND

Third: That_____(defendant(s)) [was] [were]

[_____ *(victim)*'s guardian(s)]

[an employee in _____ *(victim)*'s (school) (school district)]

[temporary caretaker or person in a position of trust or authority over _____ *(victim)*]; [AND]

[Fourth: That _____ *(victim)* was not the spouse of _____ *(defendant)*.]

Definition

"Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person, or the breast of a female.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that it would be helpful to the jury. The bracketed fourth paragraph should be used when the evidence raises an issue as to whether the victim was the spouse of a defendant.

COMMENT

Ark. Code Ann. § 5-14-121. The definitions are found in § 5-14-101.

Violation of a minor in the second degree is a Class D felony.

AMCI 2d 1413–1419 [Reserved]

AMCI 2d 1420
FAILURE TO REGISTER AS A SEX OFFENDER

_____ *(Defendant)* is charged with the offense of failure to register as a sex offender. To sustain this charge the State must prove the following things beyond a reasonable doubt:

First: That _____ *(defendant)* is required to register as a sex offender; **and**

Second: That _____ *(defendant)* failed to (register) or (verify his/her registration.)

OR

Second: That _____ *(defendant)* failed to report in person a change of (address) or (employment) or (education) or (training).

OR

Second: That _____ *(defendant)* refused to cooperate with the assessment process.

OR

Second: That _____ *(defendant)* filed false paperwork or documentation regarding (verification), or (a change of information) or (petitions to be removed from the sex offender registry.)

Definitions

"Change of address" or other words of similar import mean a change of residence or a change for more than thirty (30) days of temporary domicile, change of location of employment, education or training, or any other change that alters where a sex offender regularly spends a substantial amount of time;

"Sex offender" means a person who is adjudicated guilty of a sex offense or acquitted on the grounds of mental disease or defect of a sex offense.

COMMENT

"Failure to register-Failure to comply with reporting requirements" statute is codified at Ark. Code Ann. Section 12-12-904.

Failure to register is a Class C felony.

This is a "strict liability" offense. The State is not required to prove any particular culpable mental state. *Adkins v. State*, 371 Ark. 159 (2007).

CHAPTER 26

BIGAMY AND FAMILY OFFENSES

SYNOPSIS

2601. Bigamy

2601-AD. Bigamy — Affirmative Defenses

2602. Incest

2603. Concealing Birth

2604. Nonsupport

2604-EXP. Nonsupport — Stage One Verdict Explanation — Multiple Possible Verdicts

2604-VF. Nonsupport — Stage One Verdict Form — Multiple Possible Verdicts

2604-AD. Nonsupport Affirmative Defenses

2605. Contributing To The Delinquency of a Minor

2606. Endangering Welfare Of A Minor Or An Incompetent Person — First Degree

2606.1. Endangering Welfare Of A Minor Or An Incompetent Person — Second Degree — Third Degree

2606-AD. Endangering Welfare Of A Minor — First Degree Affirmative Defense

2607. Interference With Visitation

2607-EXP. Interference With Visitation — Stage One Verdict Explanation — Multiple Possible Verdicts

2607-VF. Interference With Visitation — Stage One Verdict Form — Multiple Possible Verdicts

2608. Interference With Court-Ordered Custody

2608.1 Interference With Custody

2609. Permitting Abuse Of A Minor

2609-D. Permitting Abuse Of A Minor — Defense

2609-EXP. Permitting Abuse Of A Minor — Stage One Verdict Explanation — Multiple Possible Verdicts

2609-VF. Permitting Abuse Of A Minor — Stage One Verdict Form — Multiple Possible Verdicts

2610. Domestic Battering In The First Degree

2610-P-EXP. Domestic Battering Of Pregnant Victim — Stage One Verdict Explanation — Multiple Possible Verdicts

2610-P-VF. Domestic Battering Of Pregnant Victim — Stage One Verdict Form — Multiple Possible Verdicts

2611. Domestic Battering In The Second Degree

2612. Domestic Battering In The Third Degree

(Text continued on page 26-3)

AMCI 2d 2601

BIGAMY

_____ *(Defendant)* is charged with the offense of bigamy. To sustain this charge the State must prove beyond a reasonable doubt that _____ *(defendant)*, being already married, purported to marry _____ .

NOTE ON USE

When the defendant asserts an affirmative defense to a charge of bigamy, AMCI 2d 2601-AD should be given.

COMMENT

Ark. Code Ann. § 5-26-201.

Bigamy is a Class A misdemeanor.

AMCI 2d 2601-AD

BIGAMY — AFFIRMATIVE DEFENSES

That at the time of the alleged offense he:

[reasonably believed that his prior spouse was dead] [or]

[had lived apart from his prior spouse for 5 consecutive years, throughout which time the prior spouse was not known to him to be alive] [or]

[reasonably believed that a court had ordered a valid termination or annulment of the prior marriage] [or]

[(otherwise) reasonably believed that he was legally eligible to marry].

NOTE ON USE

The instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-26-201(b).

AMCI 2d 2602

INCEST

_____ *(Defendant)* **is charged with the offense of incest. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant)* (purported to marry) (or) (had sexual intercourse with) (or) (engaged in deviate sexual activity with)_____ *(other person)*; and

Second: That _____ *(defendant)* **was 16 years of age or older at the time of the alleged offense; and**

Third: That _____ *(other person)* **was 16 years of age or older at the time of the alleged offense; and**

Fourth: That _____ *(defendant)* **knew that** _____ *(other person)* **was (his) (her) (ancestor) (descendent) (stepchild) (adopted child) (brother of the whole or half blood) (sister of the whole or half blood) (uncle) (aunt) (nephew) (niece) (stepgrandchild) (adopted grandchild).**

Definitions

"Sexual Intercourse." — means penetration, however slight, of the labia majora by a penis.

"Deviate sexual activity." — means any act of sexual gratification involving: [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-26-202. "Sexual intercourse" and "deviate sexual activity" are defined in Ark. Code Ann. § 5-25-101. Incest is a Class C felony.

The family relationships referred to in this instruction include blood relationships without regard to legitimacy. Ark. Code Ann. § 5-26-202 (b).

The Arkansas Supreme Court has stated that incest is not a lesser included offense of rape. *Yates v. State*, 301 Ark. 424, 785 S.W.2d 119 (1990) (Decision prior to 2003 changes.).

AMCI 2d 2603

CONCEALING BIRTH

_____ *(Defendant)* **is charged with the offense of concealing birth.**

To sustain this charge the State must prove beyond a reasonable doubt that _____ *(defendant)* **hid the corpse of a newborn child with the purpose of** (concealing the fact of the child's birth) (or) (preventing a determination of whether the child was born alive).

Definition

"Purpose." — A person acts with purpose with respect to his conduct when it is his conscious object to engage in the conduct.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-26-203. "Purpose" is defined in Ark. Code Ann. § 5-2-202.

Concealing birth is a Class D felony.

AMCI 2d 2604

NONSUPPORT

_____ *(Defendant)* **is charged with the offense of nonsupport. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

[First: That _____ *(defendant)* failed to provide support to his spouse; and

Second: That his spouse was (physically or mentally infirm) (or) (financially dependent).]

[First: That _____ *(defendant)* failed to provide support to his legitimate (child) (children); and

Second: That the (child was) (children were) less than 18 years old.]

[First: That _____ *(defendant)* failed to provide support to his illegitimate (child) (children);

Second: That the (child was) (children were) less than 18 years old; and

Third: That the (child's) (children's) parentage had been determined in a previous judicial proceeding.

[First: That _____*(defendant)* failed to provide support to his dependent (child) (children); and

Second: That the (child was) (children were) physically or mentally infirm.]

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 2604-EXP and 2604-VF if the evidence affords the jury the option of selecting a verdict from the alternatives provided therein.

If the defendant is charged with having previously been convicted of nonsupport, use AMCI 2d 2604, 8101, and 8301-VF in Stage One and in Stage Two, an appropriately modified AMCI 2d 9201 together with AMCI 2d 9305-VF and 9307-VF.

COMMENT

Ark. Code Ann. § 5-26-401. As stated in the Commentary, the offender may be of either sex.

AMCI 2d 2604-EXP

NONSUPPORT — STAGE ONE VERDICT EXPLANATION — MULTIPLE POSSIBLE VERDICTS

If you find _____ *(defendant(s))* guilty of nonsupport, you will so indicate on the verdict form provided you. You will also make [a] finding[s] about the circumstances of the offense, as directed on the form.

If you reach a verdict of not guilty, you will indicate this on the form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 2604 and 2604-VF where the evidence affords the jury a rational basis for selecting a verdict from the alternatives set out in 2604-VF. In other cases, use AMCI 2d 2604 in conjunction with AMCI 2d 8101 and 8301-VF.

AMCI 2d 2604-VF

NONSUPPORT — STAGE ONE VERDICT FORM — MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* is guilty of nonsupport.

_____
FOREMAN

We, the Jury, find _____ *(defendant)* not guilty.

_____
FOREMAN

If your verdict is guilty, you shall complete the following:

Do you, the Jury, find beyond a reasonable doubt that _____ *(defendant)* left or remained outside the state for more than thirty (30) days while a current duty of support was unpaid?

YES _____

NO _____

_____
FOREMAN

Do you, the Jury, find beyond a reasonable doubt that _____*(defendant)* owes more than $2,500 in past due child support, pursuant to court order or by operation of law, and the amount represents at least four (4) months of past due support?

YES _____

NO _____

_____
FOREMAN

Do you, the Jury, find beyond a reasonable doubt that _____ *(defendant)* owes more than $10,000 but less than $25,000 in past due child support, pursuant to court order or by operation of law?

YES _____

NO _____

_____
FOREMAN

Do you, the Jury, find beyond a reasonable doubt that _____ *(defendant)* owes more than $25,000 in past due child support, pursuant to court order or by operation of law?

YES _____

NO _____

_____

FOREMAN

NOTE ON USE

This verdict form should be used in conjunction with AMCI 2d 2604-EXP.

A question should be included on the verdict form only if the evidence affords the jury a rational basis for answering the question in the affirmative.

The definition of a Class D felony that appears in Ark. Code Ann. § 5-26-401 (b)(1)(C) does not impose an upper limit on the amount of past due child support. Hence, it is possible that the jury could answer the second question and either the third or fourth question in the affirmative. For example, if evidence was introduced showing that the defendant owed $12,000 in past due child support and that such amount represented more than four months past due child support, then the jury could rationally answer "YES" to both the second question (Class D felony) and the third question (Class C felony).

COMMENT

Non support is classified as follows:

Past due child support is more than $25,000	Class B felony
Past due child support is more than $10,000 but less than $25,000	Class C felony
Past due child support is more than $2,500 amount represents at least 4 months of past due child support	Class D felony
Defendant has previously been convicted felony of nonsupport	Class D
Defendant leaves or remains outside the state more than 30 days while duty of child support is unpaid	Class D felony
Otherwise	Class A misdemeanor

AMCI 2d 2604-AD

NONSUPPORT AFFIRMATIVE DEFENSES

[That at the time of the alleged offense _____ *(defendant)* had a just cause to fail to provide the support.]

[or]

[That when _____ *(defendant)* left or remained outside the state for more than 30 days while a current duty of support was unpaid, he did not leave or remain outside the state with the purpose of avoiding the payment of support.]

NOTE ON USE

The instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code Ann. § 5-26-401.

AMCI 2d 2605

CONTRIBUTING TO THE DELINQUENCY OF A MINOR

_____ *(Defendant)* **is charged with the offense of contributing to the delinquency of a minor. An adult is any person 18 years of age or older. A minor is any person under 18 years of age. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant)* **knowingly aided, caused, or encouraged a minor to:** [_____ *(an act prohibited by law)*]

[do any act that, if done by an adult, would render the adult subject to prosecution for _____] *(an offense punishable by imprisonment)*

[habitually absent himself, without good or sufficient cause, from his home without the consent of his (parent) (stepparent) (foster parent) (guardian) (_____) *(other lawful custodian)*]

[habitually absent himself from school when required by law to attend school]

[habitually disobey the reasonable and lawful commands of his (parent) (stepparent) (foster parent) (guardian) (_____) *(other lawful custodian)*];

And second: That _____ *(defendant)* **was an adult at the time of the time of the alleged offense.**

Definition

"Knowingly." — A person acts knowingly with respect to the results of his conduct when he is aware that it is practically certain that his conduct will cause such results.

NOTE ON USE

The definition should be given when requested by counsel or when the court feels that it will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-27-205. "Adult" and "minor" are defined in § 5-25-101. "Knowingly" is defined in Ark. Code Ann. § 5-2-202.

Contributing to the delinquency of a minor is a Class A misdemeanor.

AMCI 2d 2606

ENDANGERING WELFARE OF A MINOR OR AN INCOMPETENT PERSON — FIRST DEGREE

_____(Defendant) **is charged with the offense of endangering the welfare of** [a minor] [an incompetent person] **in the first degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____(defendant) **was a** [parent] [guardian] [person legally charged with the care or custody] [person charged with supervision] **of** [a minor] [an incompetent person]; **and**

Second: That _____(defendant) **purposely** [engaged in conduct that created a substantial risk of (death) (or) (serious physical injury) to (a minor) (an incompetent person)] [or] [deserted (a minor less than 10 years old) (an incompetent person) under circumstances creating a substantial risk of (death) (or) (serious physical injury).

Definitions

"Desert," for purposes of this instruction, means to leave the minor with no intent to return for the minor.

"Incompetent" means any person unable to care for himself because of physical or mental disease or defect. [The status embraced by this definition may or may not exist regardless of any adjudication concerning incompetency.]

"Minor" means any person under 18 years of age.

"Purposely" — A person acts purposely with respect to his conduct when it is his conscious object to engage in the conduct.

"Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels it would be helpful to the jury.

See AMCI 2d 2606-AD regarding an affirmative defense for endangering the welfare of a *minor* in the *first* degree.

COMMENT

Ark. Code Ann. § 5-27-201 (incompetent) and 203 (minor). "Serious physical injury" is defined in Ark. Code Ann. § 5-1-102. "Minor" and

"incompetent" are defined in § 5-25-101. "Purposely" is defined in Ark. Code Ann. § 5-2-202. The definition of "desert" is derived from *Burnette v. State*, 354 Ark. 584, 127 S.W. 3d 479 (2003).

Endangering the welfare of a minor or incompetent person in the first degree is a Class D felony.

AMCI 2d 2606.1
ENDANGERING WELFARE OF A MINOR OR AN INCOMPETENT PERSON—SECOND DEGREE—THIRD DEGREE

_____ (*Defendant(s)*) [is] [are] **charged with the offense of endangering the welfare of** [a minor] [an incompetent person] **in the** [second] [third] **degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

[second degree] **First: That** _____ (*defendant(s)*) **knowingly engaged in conduct creating a substantial risk of serious harm to the physical or mental welfare of** _____ (*victim*); **and;**

Second: That _____ (*defendant(s)*) **knew** _____ (*victim*) **to be** [a minor] [an incompetent person].

[third degree] **First: That** _____ (*defendant(s)*) **recklessly engaged in conduct creating a substantial risk of serious harm to the physical or mental welfare of** _____ (*victim*); **and;**

Second: That _____ (*defendant(s)*) **knew** _____ (*victim*) **to be** [a minor] [an incompetent person].

Definitions

"Incompetent" means any person unable to care for himself because of physical or mental disease or defect. [The status embraced by this definition may or may not exist regardless of any adjudication concerning incompetency.]

"Minor" means any person under 18 years of age.

"Serious harm to the physical or mental welfare" means physical or mental injury that causes protracted disfigurement, protracted impairment of physical or mental health, or loss or protracted impairment of the function of any bodily member or organ.

["Knowingly." *[second degree]* A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.]

["Recklessly" *[third degree]*—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.]

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that it would be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-27-204 (minor/second degree) and 231 (minor/third

degree); Ark. Code Ann. § 5-27-202 (incompetent/second degree) and 231 (incompetent/third degree). "Minor" and "incompetent" are defined in § 5-25-101. "Serious harm to the physical or mental welfare" is defined in § 5-27-204 and 231. "Knowingly" and "recklessly"are defined in Ark. Code Ann. § 5-2-202.

Endangering the welfare of a minor or incompetent person in the second degree is a Class A misdemeanor and in the third degree is a Class B misdemeanor.

Where the appellant admitted that when the child he was caring for began to cry he became upset and frustrated and bite, pinched, and squeezed the child, the evidence did not support a finding that appellant's actions were reckless. Thus, there was no rational basis for instructing the jury on the offense of endangering the welfare of a minor in the third-degree. *Myers v. State*, 2016 Ark. App. 501.

(Text continued on page 26-27)

AMCI 2d 2606-AD

ENDANGERING WELFARE OF A MINOR — FIRST DEGREE AFFIRMATIVE DEFENSE

That _____ *(defendant)* **is the parent of the minor and** (voluntarily delivered the minor to and left the minor with) (voluntarily arranged for another person to deliver the minor to and leave the minor with) **a** (medical provider) (or) (law enforcement agency).

Definitions

"Medical provider." — means any emergency department of a hospital licensed by the Arkansas State Board of Health.

"Law enforcement agency." — means any police force or organization whose primary responsibility as established by law or ordinance is the enforcement of the criminal, traffic, or highway laws of this state and which is staffed 24 hours a day.

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use. The definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code. Ann. § 5-27-203(c). The definitions of "medical provider" and "law enforcement officer" are found in Ark. Code. Ann. § 9-34-201.

AMCI 2d 2607

INTERFERENCE WITH VISITATION

_____ *(Defendant(s))* is **charged with the offense of interference with visitation. To sustain this charge the State must prove the following things beyond a reasonable doubt:**

First: That _____ *(defendant(s))* [took] [or] [enticed] [or] [kept] **a minor from another person entitled by a court decree or order to visitation with the minor; and**

Second: That _____ *(defendant)* **knew that** [he] [she] **had no lawful right to do so.**

NOTE ON USE

This instruction should be given in conjunction with AMCI 2d 2607-EXP and 2607-VF if the evidence affords the jury the option of selecting a verdict form the alternatives set out in AMCI 2d 2607-VF.

COMMENT

Ark. Code Ann. § 5-26-501.

"Minor" is defined at Ark. Code Ann. § 5-25-101(2).

Interference with visitation is a Class C misdemeanor. It is a Class A misdemeanor if the defendant has previously been convicted two or more times of interference with visitation and a Class D felony if the minor is removed from the state of Arkansas.

AMCI 2d 2607-AD

INTERFERENCE WITH VISITATION — AFFIRMATIVE DEFENSE

[That (he) (she) reasonably believed that (his) (her) act was necessary to protect the child from imminent physical harm and the defendant's conduct in withholding visitation rights was a reasonable response to the harm believed to be imminent] [or]

[That (he) (she) reasonably believed that the person entitled to visitation would remove the child from the jurisdiction of the court] [or]

[That the act was committed with the mutual consent of all parties having a right to custody and visitation of the child] [or]

[That the act was otherwise authorized by law].

NOTE ON USE

This instruction should be given in the format of AMCI 2d 601 when the evidence justifies its use.

COMMENT

Ark. Code. Ann. § 5-26-501(c).

AMCI 2d 2607-EXP

INTERFERENCE WITH VISITATION — STAGE ONE VERDICT EXPLANATION — MULTIPLE POSSIBLE VERDICTS

If you find _____ *(defendant)* guilty of interference with visitation, you will so indicate on the verdict form provided you. You will also make a finding about the circumstances of the offense, as requested on the form.

If you reach a verdict of not guilty, you will indicate this on the form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 2607 and 2607-VF where the evidence affords the jury a rational basis for selecting a verdict from the alternatives set out in AMCI 2d 2607-VF. In other cases, use AMCI 2d 2607 in conjunction with AMCI 2d 8101 and 8301-VF.

AMCI 2d 2607-VF

INTERFERENCE WITH VISITATION — STAGE ONE VERDICT FORM — MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* is guilty of interference with visitation.

_____
FOREMAN

We, the Jury, find _____ *(defendant)* not guilty.

_____
FOREMAN

If your verdict is guilty, you shall complete the following:

Do you, the Jury, find beyond a reasonable doubt that _____ *(minor(s))* [was] [were] [taken] [or] [enticed] [or] [kept] outside the state?

YES _____

NO _____

_____
FOREMAN

NOTE ON USE

This verdict form should be used only in conjunction with AMCI 2d 2607-EXP.

If a verdict of guilt is returned, the appropriate standard punishment instruction and verdict form should be used in Stage Two.

AMCI 2d 2608
INTERFERENCE WITH COURT-ORDERED CUSTODY

(Defendant) **is charged with the offense of interference with court-ordered custody. To sustain this charge the State must prove beyond a reasonable doubt:**

First: That (defendant) [took] [or] [enticed] [or] [kept] **a minor from any person entitled by a court decree or order to custody of the minor; and**

Second: That (defendant) **knew that** [he/she] **had no lawful right to do so.**

NOTE ON USE

If the evidence raises an issue as to whether a minor was taken from the state or from the lawful custodian while the custodian and minor are being housed at a shelter as defined in Ark. Code Ann. § 9-4-102, a special explanatory instruction and a special verdict form permitting this finding should be given. For example, *see* AMCI 2d 2607-EXP and 2607-VF.

COMMENT

Ark. Code Ann. § 5-26-502. "Minor" is defined at Ark. Code Ann. § 5-25-101(4). Interference with court-ordered custody may be a Class D felony or a Class A misdemeanor.

AMCI 2d 2608.1
INTERFERENCE WITH CUSTODY

(Defendant) **is charged with the offense of interference with custody. To sustain this charge the State must prove beyond a reasonable doubt:**

First: That (defendant) [took] [kept] [or] [enticed] [or] [(aided) (abetted) (hired) (or) (procured) another person to take, keep, or entice] **a minor from the custody of** [his/her (parent) (guardian)] [a public agency having lawful charge of the minor] [a lawful custodian]; **and**

Second: That (defendant) **knew that** [he/she] **had no lawful right to do so.**

Definitions

"Minor" means any person under eighteen (18) years of age.

For purpose of this instruction, "parent" includes an unmarried woman who gave birth to the child.

COMMENT

Ark. Code Ann. § 5-26-503. "Minor" is defined at Ark. Code Ann. § 5-25-101(4). Interference with custody is a Class C felony.

(Text continued on page 26-39)

AMCI 2d 2609

PERMITTING ABUSE OF A MINOR

_____ *(Defendant)* is charged with the offense of permitting abuse of a minor. To sustain this charge the State must prove beyond a reasonable doubt:

First: That _____ *(victim)* was under the age of 18 years; and

Second: That _____ *(victim)* was the victim of abuse; and

Third: That _____ *(defendant)* recklessly failed to take action to prevent the abuse of _____ *(victim)*; and

Fourth: That _____ *(defendant)* (is) (was) a (parent) (guardian) (or) (person legally charged with the care and custody) of _____ *(victim).*

Definitions

"Abuse." — means (sexual intercourse) (or) (deviate sexual activity) (or) (sexual contact) (or) (causing physical injury) (or) (causing serious physical injury) (or) (causing death) which could be prosecuted as a delinquent or criminal act.

"Deviate sexual activity." — means any act of sexual gratification involving: [The penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person;] [The penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Physical injury." — means the impairment of physical condition or the infliction of substantial pain.

"Recklessly." — A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation.

"Serious physical injury." — means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

"Sexual contact." —means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, or buttocks, or anus of a person or the breast of a female.

"Sexual intercourse." — means the penetration, however slight, of the labia majora by a penis.

NOTE ON USE

The definition of "abuse" should be given in every case. Other definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

This instruction should be used in conjunction with AMCI 2d 2609-EXP and 2609-VF if the evidence affords the jury the option of selecting a verdict from the alternatives provided therein.

The statute defining the offense, Ark. Code Ann. § 5-27-221(a)(2), also creates a defense. *See* AMCI 2d 2609-D.

COMMENT

Ark. Code Ann. § 5-27-221. "Abuse" is defined at Ark. Code Ann. § 5-27-221(b); "physical injury," at § 5-1-102(14); "serious physical injury," at § 5-1-102(19); "deviate sexual activity," at § 5-14-101(1); "recklessly," at § 5-2-202(3); "sexual intercourse," at § 5-14-101(9); and "sexual contact," at § 5-14-101(8).

Permitting child abuse may be a Class B felony or a Class D felony.

AMCI 2d 2609-D

PERMITTING ABUSE OF A MINOR — DEFENSE

It is a defense to the offense of permitting abuse of a minor that _____ *(defendant)* **took immediate steps to end the abuse of** the minor including prompt notification of (medical) (or) (law enforcement) **authorities upon first knowing or having good reason to know that abuse occurred. The defendant in asserting this defense is required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence with regard to this defense leaves you with a reasonable doubt as to the defendant's guilt, then you must find him not guilty.**

COMMENT

Ark. Code Ann. § 5-27-221.

Under Ark. Code Ann. § 5-1-111(c), if there is evidence to support this defense, it must be submitted to the jury, and the jury must be told that any reasonable doubt on that issue requires that the defendant be acquitted.

AMCI 2d 2609-EXP

PERMITTING ABUSE OF A MINOR — STAGE ONE VERDICT EXPLANATION — MULTIPLE POSSIBLE VERDICTS

If you find _____ *(defendant)* guilty of permitting abuse of a minor, you will so indicate on the verdict form provided to you. You will also make a finding about the circumstances of the offense, as requested on the form.

If you reach a verdict of not guilty, you will indicate this on the form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 2609 and 2609-VF where the evidence affords the jury a rational basis for selecting a verdict from the alternatives set out in AMCI 2d 2609-VF. In other cases, use AMCI 2d 2609 in conjunction with AMCI 2d 8101 and 8301-VF.

AMCI 2d 2609-VF

PERMITTING ABUSE OF A MINOR — STAGE ONE VERDICT FORM — MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* **is guilty of permitting abuse of a minor.**

_____

FOREMAN

We, the Jury, find _____ *(defendant)* **not guilty.**

_____

FOREMAN

If your verdict is guilty, you shall complete the following:

Do you, the Jury, find beyond a reasonable doubt that the abuse of _____ *(victim)* [was (sexual intercourse) (or) (deviate sexual activity)] [or] [caused serious physical injury to _____*(victim)*] (or) [caused death to _____*(victim)*]?

YES _____

NO _____

_____

FOREMAN

NOTE ON USE

This verdict form should be used only in conjunction with AMCI 2d 2609-EXP.

If a verdict of guilt is returned, the appropriate standard punishment instruction and verdict form should be used in Stage Two.

AMCI 2d 2610
DOMESTIC BATTERING IN THE FIRST DEGREE

_____ *(Defendant)* is charged with the offense of domestic battering in the first degree. To sustain this charge the State must prove beyond a reasonable doubt that:

[_____ *(Defendant)*, with the purpose of causing serious physical injury to a family or household member, caused serious physical injury to a family or household member by means of a deadly weapon.]

[_____ *(Defendant)*, with the purpose of (seriously and permanently disfiguring a family or household member) ([destroying] [amputating] [or] [permanently disabling] a member or organ of the body of a family or household member), caused such an injury to a family or household member.]

[_____ *(Defendant)* knowingly caused serious physical injury to a family or household member that [he or she] knew to be [sixty years of age or older] [twelve years of age or younger.]]

[_____ *(Defendant)* caused serious physical injury to a family or household member under circumstances manifesting extreme indifference to the value of human life.]

[_____ *(Defendant)*, with the purpose of causing physical injury to a family or household member, caused physical injury to a family or household member by means of a firearm.] [or]

[First, _____ *(Defendant)*, on _____ (insert date(s)), _____ (insert element(s) from AMCI 2d 2610, 2611, or 2612 constituting an act of domestic battering under Ark. Code Ann. § 5-26-303-305); and

Second, _____ *(defendant)* has been convicted on two previous occasions of battery against a family or household member in (Arkansas) (or) (another jurisdiction) and these acts of battery occurred within 10 years of _____ (insert the date(s) set out in the preceding paragraph).]

[_____ *(Defendant(s))* knowingly caused serious physical injury to a family or household member who was four years of age or younger under circumstances manifesting extreme indifference to the value of human life.]

Definitions

"Deadly weapon" means a firearm or anything manifestly designed, made, adapted for the purpose of inflicting death or serious physical injury or anything that in the manner of its use or intended use is capable of causing death or serious physical injury.

"Family or household member" means spouses, former spouses, parents, persons related by blood within the fourth degree of consanguinity, children, including any minor residing in the household, persons who are presently or in the past have resided or cohabited together, persons who have or have had a child in common, or persons who are presently or in the past have been in a dating relationship together.

"Dating relationship" means a romantic or intimate social relationship between two individuals which shall be determined by examining the following factors:

(1) The length of the relationship;

(2) The type of the relationship; and

(3) The frequency of interaction between the two individuals involved in the relationship.

"Dating relationship" shall not include a casual relationship or ordinary fraternization between two individuals in a business or social context.

"Knowingly."—A person acts knowingly (or with knowledge) with respect to his conduct or the circumstances that exist at the time of his act when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purpose."—A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they would be helpful to the jury.

Domestic battering in the first degree is a Class A felony if committed against a woman the defendant knew or should have known was pregnant. If defendant is charged with committing domestic battering in the first degree against a woman the defendant knew or should have known was pregnant, use this instruction in conjunction with AMCI 2d 2610-P-EXP and 2610-P-VF.

Domestic battering in the first degree is also a Class A felony if, within 5 years of the offense, the defendant committed domestic battering in any degree or violated an equivalent penal law of this state or another state or foreign jurisdiction. If defendant is charged with having committed domestic battering based on conduct within 5 years of the current offense, use AMCI 2d 9206 and AMCI 2d 9310-VF in Stage Two.

COMMENT

Ark. Code Ann. § 5-26-303. Consanguinity shall be computed pursuant to Ark. Code Ann. § 28-9-212. "Family or household member" is defined in Ark. Code Ann. § 5-26-302. "Purpose" is defined in Ark. Code Ann. § 5-2-202. "Serious physical injury," and "deadly weapon" are defined in Ark. Code Ann. § 5-1-102.

Domestic battering in the first degree is a Class B felony, but, as discussed in the Note on Use, domestic battering in the first degree is a Class A felony if, within

5 years of the offense, the defendant committed domestic battering in any degree or violated an equivalent penal law of this state or another state or foreign jurisdiction. The offense is a Class Y felony under section 5-26-303 (a)(2) (disfiguring) and section (a)(7) (victim is a family member under age four).

Domestic battering in the first degree is also a Class A felony if committed against a woman the defendant knew or should have known was pregnant.

In *Crayton v. State*, 2018 Ark. App. 110, appellant was convicted of first-degree domestic battering under subsection (a) (5) of the first-degree domestic-battering statute, which requires the State to prove that: (1) he committed second-or third-degree battering and (2) he had two previous domestic-battering convictions within the 10 years before the current offense. Thus, the previous offenses were elements of the first-degree domestic battering charge, and the trial court did not err when it admitted evidence of appellant's prior domestic-battering convictions during the guilt phase of appellant's trial. The model jury instruction, AMCI Crim. 2d 2610, accurately reflects the language of Ark. Code Ann. § 5-26-303 (a)(5).

The circuit court did not abuse its discretion when it rejected appellant's proffered version of AMCI Crim. 2d 2610, which added a definition for the phrase "circumstances manifesting extreme indifference to the value of human life" to the model instruction. *Reynolds v. State*, 2018 Ark. App. 8. A judge is not required to give a proffered jury instruction just because it is a correct statement of the law. A non-model instruction should only be given when the model instruction does not correctly state the law or when there is no model instruction on the subject. *Id.*

(Text continued on page 26-51)

AMCI 2d 2610-P-EXP
DOMESTIC BATTERING OF PREGNANT VICTIM STAGE ONE VERDICT FORM—MULTIPLE POSSIBLE VERDICTS

If you find _____ *(defendant)* guilty of domestic battering in the (first) (second) (third) degree, you will so indicate on the verdict form provided to you. You will also make a finding as to whether _____ *(defendant)* knew or should have known that _____ *(victim)* was pregnant at the time of the alleged battering, as requested on the form.

If you reach a verdict of not guilty, you will indicate this on the form.

Definitions

"Knowingly."—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Pregnant."—A woman is considered pregnant four (4) weeks after conception.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury. This instruction should be used when the state seeks to enhance the grade of a domestic battering offense because the defendant knew the victim was pregnant.

COMMENT

Ark. Code. Ann. § 5-26-303(b)(2), § 5-26-304(b)(2), and § 5-26-305(b)(2). "Knowingly" is defined in Ark. Code Ann. § 5-2-202. "Pregnant" is defined in Ark. Code Ann. § 5-26-312.

Domestic battering in the first degree is a Class A felony, domestic battering in the second degree is a Class B felony, and domestic battering in the third degree is a Class D felony if the defendant knew or should have known that the victim was pregnant.

(Text continued on page 26-53)

AMCI 2d 2610-P-VF
DOMESTIC BATTERING OF PREGNANT VICTIM STAGE ONE VERDICT FORM—MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____ *(defendant)* is guilty of domestic battering in the (first) (second) (third) degree.

_____
FOREMAN

We, the Jury, find _____ *(defendant)* not guilty.

_____
FOREMAN

If your verdict is guilty, you shall complete the following:

Do you, the Jury, find beyond a reasonable doubt that _____ *(defendant)* knew or should have known that _____ *(victim)* was pregnant at the time of the battering?

YES _____

NO _____

_____
FOREMAN

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 2610-P-EXP and either AMCI 2d 2610 (domestic battering in the first degree), AMCI 2d 2611 (domestic battering in the second degree), or AMCI 2d 2612 (domestic battering in the third degree). Domestic battering in the first degree is a Class A felony, domestic battering in the second degree is a Class C felony, and domestic battering in the third degree is a Class D felony if the defendant knew or should have known that the victim was pregnant.

AMCI 2d 2611
DOMESTIC BATTERING IN THE SECOND DEGREE

_____ (Defendant) is charged with the offense of domestic battering in the second degree. To sustain this charge the State must prove beyond a reasonable doubt that:

[_____ (Defendant), with the purpose of causing physical injury to a family or household member, caused serious physical injury to a family or household member.]

[_____ (Defendant), with the purpose of causing physical injury to a family or household member, caused physical injury to a family or household member by means of a deadly weapon.]

[_____ (Defendant) recklessly caused serious physical injury to a family or household member by means of a deadly weapon.]

[_____ (Defendant) knowingly caused physical injury to a family or household member that knew to be [he or she] [sixty years of age or older] [twelve years of age or younger.]

Definitions

"Knowingly."—A person acts knowingly (or with knowledge) with respect to his conduct or the circumstances that exist at the time of his act when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Deadly weapon" means a firearm or anything manifestly designed, made, adapted for the purpose of inflicting death or serious physical injury or anything that in the manner of its use or intended use is capable of causing death or serious physical injury.

"Family or household member" means spouses, former spouses, parents, persons related by blood within the fourth degree of consanguinity, children, including any minor residing in the household, persons who are presently or in the past have resided or cohabited together, persons who have or have had a child in common, or persons who are presently or in the past have been in a dating relationship together.

"Dating relationship" means a romantic or intimate social relationship between two individuals which shall be determined by examining the following factors:

(1) The length of the relationship;

(2) The type of the relationship; and

(3) The frequency of interaction between the two individuals involved in the relationship.

"Dating relationship" shall not include a casual relationship or ordinary fraternization between two individuals in a business or social context.

"Physical injury" means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.

"Purpose."—A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Recklessly."—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.

"Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they would be helpful to the jury.

Domestic battering in the second degree is a Class B felony if committed against a woman the defendant knew or should have known was pregnant. If defendant is charged with committing domestic battering in the second degree against a woman the defendant knew or should have known was pregnant, use this instruction in conjunction with AMCI 2d 2610-P-EXP and 2610-P-VF.

Domestic battering in the second degree is also a Class B felony if, within 5 years of the offense, the defendant committed domestic battering in any degree or violated an equivalent penal law of this state or another state or foreign jurisdiction. If defendant is charged with having committed domestic battering based on conduct with 5 years of the current offense, use AMCI 2d 9206 and AMCI 2d 9310-VF in Stage Two.

It is also a Class B felony, if within 10 years of the conduct on which the current prosecution is based, the defendant committed two or more offenses of battery against a family or household member as defined by the laws of this state or by the equivalent laws of any other state or foreign jurisdiction. If these facts are alleged, use AMCI 2d 9206.1 and 9310.1-VF.

COMMENT

Ark. Code Ann. § 5-26-304. "Family or household member" is defined in Ark. Code Ann. § 5-26-302. "Physical injury," "serious physical injury," and "deadly weapon" are defined in Ark. Code Ann. § 5-1-102. "Purpose," and "recklessly" are defined in Ark. Code Ann. § 5-2-202.

Domestic battering in the second degree is a Class C felony, but, as discussed in the Note on Use, domestic battering in the second degree is a Class B felony if, within 5 years of the conduct on which the current prosecution is based, the

defendant committed domestic battering in any degree or violated an equivalent penal law of this state or another state or foreign jurisdiction. Also see the Note on Use where it is alleged that within 10 years of the conduct on which the current prosecution is based, the defendant committed two or more offenses of battery against a family or household member.

Domestic battering in the second degree is also a Class B felony if committed against a woman the defendant knew or should have known was pregnant.

AMCI 2d 2612
DOMESTIC BATTERING IN THE THIRD DEGREE

_____ (Defendant) is charged with the offense of domestic battering in the third degree. To sustain this charge the State must prove beyond a reasonable doubt that:

[_____ (Defendant), with the purpose of causing physical injury to a family or household member, caused physical injury to a family or household member.]

[_____ (Defendant) recklessly caused physical injury to a family or household member.]

[_____ (Defendant) negligently caused physical injury to a family or household member by means of a deadly weapon.]

[_____ (Defendant) purposely caused (stupor) (unconsciousness) (physical impairment) (mental impairment) (or) (injury) to a family or household member by administering to a family or household member, without the person's consent, any drug or other substance.]

Definitions

"Deadly weapon" means a firearm or anything manifestly designed, made, adapted for the purpose of inflicting death or serious physical injury or anything that in the manner of its use or intended use is capable of causing death or serious physical injury.

"Family or household member" means spouses, former spouses, parents, persons related by blood within the fourth degree of consanguinity, children, including any minor residing in the household, persons who are presently or in the past have resided or cohabited together, persons who have or have had a child in common, or persons who are presently or in the past have been in a dating relationship together.

"Dating relationship" means a romantic or intimate social relationship between two individuals which shall be determined by examining the following factors:

(1) The length of the relationship;

(2) The type of the relationship; and

(3) The frequency of interaction between the two individuals involved in the relationship.

"Dating relationship" shall not include a casual relationship or ordinary fraternization between two individuals in a business or social context.

"Negligently."—The term "negligent' as used in this criminal case means more than it does in civil cases. To prove negligence in a criminal case the State must show that defendant should have been aware of a substantial and unjustifiable risk that the injury would occur. The risk must have been of such a nature and degree that defendant's failure to perceive it, considering the nature and purpose of

defendant's conduct and the circumstances known to the defendant, involved a gross deviation from the standard of care that a reasonable person would have observed in the situation.

"Physical injury" means the impairment of physical condition or the infliction of substantial pain or the infliction of substantial bruising, swelling or visible marks associated with physical trauma.

"Purpose."—A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Recklessly."—A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.

"Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment or health, or loss or protracted impairment of the function of any bodily member or organ.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they would be helpful to the jury.

Domestic battering in the third degree is a Class D felony if committed against a woman the defendant knew or should have known was pregnant. If defendant is charged with committing domestic battering in the second degree against a woman the defendant knew or should have known was pregnant, use this instruction in conjunction with AMCI 2d 2610-P-EXP and 2610-P-VF.

Domestic battering in the third degree is also a Class D felony if, within 5 years of the conduct on which the current prosecution is based, the defendant committed domestic battering in any degree, aggravated assault on a family or household member (Ark. Code Ann. § 5-26-306), or violated an equivalent penal law of this state or another state or foreign jurisdiction. If defendant is charged with having committed another offense based on conduct within 5 years of the current offense, use AMCI 2d 9206 and AMCI 2d 9310-VF in Stage Two.

It is also a Class D felony, if within 10 years of the conduct on which the current prosecution is based, the defendant committed two or more offenses of battery against a family or household member as defined by the laws of this state or by the equivalent laws of any other state or foreign jurisdiction. If these facts are alleged, use AMCI 2d 9206.1 and 9310.1-VF.

COMMENT

Ark. Code Ann. § 5-26-305. "Family or household member" is defined in Ark. Code Ann. § 5-26-302. "Physical injury" and "deadly weapon" are defined in Ark. Code Ann. § 5-1-102. "Purpose," "negligently," and "recklessly" are defined in Ark. Code Ann. § 5-2-202.

Domestic battering in the third degree is a Class A misdemeanor, but, as discussed in the Note on Use, domestic battering in the third degree is a Class D felony if, within 5 years of the conduct on which the current prosecution is based, the defendant committed domestic battering in any degree, aggravated assault on a family or household member (Ark. Code Ann. § 5-26-306), or violated an equivalent penal law of this state or another state or foreign jurisdiction. Also see the Note on Use where it is alleged that within 10 years of the conduct on which the current prosecution is based, the defendant committed two or more offenses of battery against a family or household member.

Domestic battering in the third degree is also a Class D felony if committed against woman the defendant knew or should have known was pregnant.

CHAPTER 27

OFFENSES AGAINST CHILDREN

SYNOPSIS

2700. Definitions For Chapter 27—Computer Crimes Against Minors

2701. Distributing, Possessing, Or Viewing Matter Depicting Sexually Explicit Conduct Involving A Child

2702. Computer Child Pornography

2703. Computer Exploitation Of A Child In The First Degree

2704. Computer Exploitation Of A Child In The Second Degree

2705. Internet Stalking Of A Child

2705-EXP. Internet Stalking Of A Child Stage One Verdict Explanation—Multiple Possible Verdicts

2705-VF. Internet Stalking Of A Child Stage One Verdict Form—Multiple Possible Verdicts

2706. Transportation of a Minor for Prohibited Sexual Conduct

2707. Sexual Grooming of a Child

2708. Engaging Child in Sexually Explicit Conduct for Use in Visual or Print Medium

AMCI 2d 2700 DEFINITIONS FOR CHAPTER 27 COMPUTER CRIMES AGAINST MINORS

For purposes of Chapter 27, use the following definitions when appropriate:

(1) "Child" means any person under eighteen (18) years of age.

(2) (A) "Computer" means an electronic, magnetic, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage functions and includes any data storage facility or communications facility directly related to or operating in conjunction with the device.

(B) "Computer" also includes any on-line service, internet service, or local bulletin board, any electronic storage device, including a floppy disk or other magnetic storage device, or any compact disk that has read-only memory and the capacity to store audio, video, or written materials.

(3) "Computer network" means the interconnection of communications lines with a computer through remote terminals or a complex consisting of two (2) or more interconnected computers.

(4) "Computer program" means a set of instructions, statements, or related data that, in actual or modified form, is capable of causing a computer or a computer system to perform specified functions.

(5) "Computer software" means one (1) or more computer programs, existing in any form, or any associated operational procedures, manuals, or other documentation.

(6) "Computer system" means a set of related, connected, or unconnected computers, other devices, and software.

(7) "Deviate sexual activity" means any act involving the penetration, however slight, of the:

(A) Anus or mouth of one person by the penis of another person; or

(B) Labia majora or anus of one person by any body member or foreign instrument manipulated by another person.

(8) "Electronic mail" means an electronic message, file, data, or other information that is transmitted between two or more computers, computer networks, or electronic terminals; or transmitted within or between computer networks.

(9) "Electronic mail service provider" means a person who is an intermediary in the transmission of electronic mail from the sender to the recipient; or who provides to end users of electronic mail service the ability to send and receive electronic mail.

(10) "Interactive computer service" means an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and also the systems operated or services offered by libraries or educational institutions.

(11) "Internet" means the international computer network of both federal and non-federal interoperable packet switched data networks.

(12) "Performance" means any play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation or parts whether performed live or photographed, filmed, videotaped, or visually depicted by any other photographic, cinematic, magnetic, or electronic means.

(13) "Reproduction" means, but is not limited to, computer-generated images.

(14) "Sexual intercourse" means penetration, however slight, of the labia majora by a penis.

(15) "Sexually explicit conduct" means actual or simulated:

(A) Sexual intercourse;

(B) Deviate sexual activity;

(C) Bestiality;

(D) Masturbation;

(E) Sadomasochistic abuse for the purpose of sexual stimulation; or

(F) Lewd exhibition of the:

(i) Genitals or pubic area of any person; or

(ii) Breast of a female.

(16) "Visual or print medium" means any film, photograph, negative, slide, book, magazine, magnetic image, electronic image, or other visual or print medium other than material specifically used by a licensed medical professional or mental health professional, or both, for the purpose of assessment, evaluation, and treatment of a sex offender.

NOTE ON USE

Insert definition(s) in instructions in this Chapter for computer crimes against minors when appropriate.

COMMENT

Ark. Code Ann. § 5-27-302.

AMCI 2d 2701
DISTRIBUTING, POSSESSING, OR VIEWING MATTER DEPICTING SEXUALLY EXPLICIT CONDUCT INVOLVING A CHILD

_____ *(Defendant)* **is charged with the offense of** (distributing) (possessing) (or) (viewing) **matter depicting sexually explicit conduct involving a child.**

To sustain this charge, the state must prove the following things beyond a reasonable doubt:

First, that _____ (Defendant)

[(received for the purpose of selling) (sold) (procured) (manufactured) (gave) (provided) (lent) (traded) (mailed) (delivered) (transferred) (published) (distributed) (circulated) (disseminated) (presented) (exhibited) (advertised) (offered) (or) (agreed to offer) **through** (any means) (the Internet) a (photograph) (film) (videotape) (computer program or file) (video game) (or) (any other reproduction or reconstruction) **which depicts a child or incorporates the image of a child engaging in sexually explicit conduct;]**

or

[(possessed) (or) (viewed through (any means) (on the Internet)) a (photograph) (film) (videotape) (computer program or file) (computer-generated image) (video game) (or) (any other reproduction) **which depicts a child or incorporates the image of a child engaging in sexually explicit conduct;] and**

Second, that _____ (Defendant) did so knowingly.

Definitions

"Knowingly."—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels they will be helpful to the jury. *See* Definitions at beginning of this chapter.

"It is an affirmative defense to a prosecution under this section that the defendant in good faith reasonably believed that the child depicted in the matter was seventeen (17) years of age or older." Ark. Code Ann. § 5-27-602 (c). When this affirmative defense is an issue at trial, insert this language in the first paragraph of AMCI 2d 601.

In first offense cases, use this instruction with AMCI 2d 8101 and 8301-VF in Stage One, and the appropriate Class C felony instructions in Stage Two. If the defendant is charged with having previously been convicted of this offense, then in Stage Two, use with appropriate Class B sentencing instructions.

COMMENT

Ark. Code Ann. § 5-27-602. Definitions for this offense are found in Ark. Code Ann. § 5-27-601 and appear in the Definition Section at the beginning of this chapter. "Knowingly" is defined in Ark. Code Ann. § 5-2-202.

The offense of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child is a Class C felony for the first offense and a Class B felony for any subsequent offenses.

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AMCI 2d 2702

COMPUTER CHILD PORNOGRAPHY

_____ *(Defendant)* **is charged with the offense of computer child pornography. To sustain this charge, the state must prove the following things beyond a reasonable doubt:**

First, [that _____ *(defendant)*

(compiled) (entered into) (or) (transmitted) by means of computer

or

(made) (printed) (published) (or) (reproduced) by other computerized means

or

(caused) (or) (allowed) to be entered into or transmitted by means of computer

or

(bought) (sold) (received) (exchanged) (disseminated) by means of computer

a (notice) (statement) (advertisement) (child's (name) (telephone number) (place of residence) (physical characteristics) (or) (other descriptive or identifying information)) **for purposes of** (facilitating) (encouraging) (offering) (or) (soliciting) (sexually explicit conduct of or with (a child) (or) (an individual believed by the (defendant) to be a child)) (or) (the visual depiction of sexually explicit conduct of or with (a child) (or) (an individual believed by the (defendant) to be a child));]

[OR]

[that _____ *(defendant)* **utilized** (a computer online service) (an internet service) (or) (a local bulletin board service) to (seduce) (solicit) (lure) (entice) (or) (attempt to (seduce) (solicit) (lure) (or) (entice)) (a child) (or) (an individual believed by the _____*(defendant)* to be a child) **to engage in sexually explicit conduct;] and**

Second, that _____*(defendant)* **did so knowingly.**

Definitions

"Knowingly."— A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of

that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels they will be helpful to the jury. *See:* Definitions at beginning of this chapter.

Use this instruction with AMCI 2d 8101 and 8301-VF in Stage One, and in Stage Two, use with Class B felony sentencing instructions.

COMMENT

Ark. Code Ann. § 5-27-603. Definitions for this offense are found in Ark. Code Ann. § 5-27-601 and appear in the Definition Section at the beginning of this chapter. "Knowingly" is defined in Ark. Code Ann. § 5-2-202.

The offense of computer child pornography is a Class B felony.

AMCI 2d 2703

COMPUTER EXPLOITATION OF A CHILD IN THE FIRST DEGREE

_____ *(Defendant)* **is charged with the offense of computer exploitation of a child in the first degree. To sustain this charge, the state must prove the following things beyond a reasonable doubt:**

That _____ *(defendant)* (caused) (or) (permitted) **a child to engage in sexually explicit conduct** (knowing) (having reason to know) (or) (intending) **that the sexually explicit conduct might be** (photographed) (filmed) (reproduced) (or) (reconstructed) (in any manner) (on the Internet) (or) (as part of an exhibition or performance).

Definitions

"Knowingly."— A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels they will be helpful to the jury. *See:* Definitions at beginning of this chapter.

If the defendant is charged with a first offense, use this instruction with AMCI 2d 8101 and 8301-VF in Stage One, and use Class B felony sentencing instructions in Stage Two. If the defendant is charged with a second or subsequent offense, use Class A felony sentencing instructions in Stage Two.

COMMENT

Ark. Code Ann. § 5-27-605 (a). Definitions are found in Ark. Code Ann. § 5-27-601 and appear at the beginning of this chapter. "Knowingly" is defined in Ark. Code Ann. § 5-2-202.

The offense of computer exploitation of a child in the first degree is a Class B felony for the first offense and a Class A felony for second or subsequent offenses.

AMCI 2d 2704

COMPUTER EXPLOITATION OF A CHILD IN THE SECOND DEGREE

_____ *(Defendant)* **is charged with the offense of computer exploitation of a child in the second degree. To sustain this charge, the state must prove the following things beyond a reasonable doubt:**

That _____ *(defendant)*

[(photographed) (or) (filmed) **a child engaged in sexually explicit conduct]**

[or]

[used (a device) (a computer) to (reproduce or reconstruct) **the image of a child engaged in sexually explicit conduct.]**

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels they will be helpful to the jury. *See:* Definitions at beginning of this chapter.

Use this instruction with AMCI 2d 8101 and 8301-VF in Stage One, and in Stage Two, use with the appropriate Class D felony sentencing instructions.

COMMENT

Ark. Code Ann. § 5-27-605 (b). Definitions are found in Ark. Code Ann. § 5-27-601 and appear at the beginning of this chapter.

The offense of computer exploitation of a child in the second degree is a Class D felony.

AMCI 2d 2705

INTERNET STALKING OF A CHILD

_____*(Defendant)* **is charged with the offense of Internet stalking of a child. To sustain this charge, the state must prove the following things beyond a reasonable doubt:**

[First, that _____*(defendant)* **utilized** (a computer online service) (an Internet service) (a local Internet bulletin board service) (or) (a means of electronic communication) to (seduce) (solicit) (lure) (or) (entice)

(a child fifteen (15) years of age or younger);

(or)

(an individual that the _____ *(defendant)* believed to be fifteen (15) years of age or younger);

Second, that _____ *(defendant)* **did so in an effort to arrange a meeting with** (the child) (the individual) **for the purpose of engaging in** (sexual intercourse) (sexually explicit conduct) (or) (deviate sexual activity);

Third, that _____ *(defendant)* **was twenty-one (21) years of age or older at the time of the offense; and**

Fourth, that _____*(defendant)* **did so knowingly.**]

[or]

[First, that _____*(defendant)* **utilized** (a computer online service) (an Internet service) (or) (a local Internet bulletin board service) (or) (a means of electronic communication) **to** (compile) (transmit) (publish) (reproduce) (buy) (sell) (receive) (exchange) (or) (disseminate) (the) (name) (telephone number) (email address) (residence address) (picture) (physical description) (characteristics) (or) (any other identifying information) **on**

(a child fifteen (15) years of age or younger);

(or)

(an individual that the _____ *(defendant)* believed to be fifteen (15) years of age or younger);

Second, that _____ *(defendant)* **did so in furtherance of an effort to arrange a meeting with the** (child) (individual) **for the purpose of engaging in** (sexual intercourse) (sexually explicit conduct) (or) (deviate sexual activity);

Third, that _____ *(defendant)* **was twenty-one (21) years of age or older at the time of the offense; and**

Fourth, that _____*(defendant)* **did so knowingly.**]

[First, that_____ *(defendant)* **utilized** (a computer online service) (an Internet service) (a local Internet bulletin board service) (or) (a means of electronic communication) **to arrange a meeting with a person who held himself or herself out as** (the parent of) (the guardian of) (a family member of) (or) (a person of authority over)

(a child fifteen (15) years of age or younger);

(or)

(an individual that the _____ *(defendant)* believed to be fifteen (15) years of age or younger);

Second, that _____ *(defendant)* **did so in order to seduce, solicit, lure, or entice the** (child) (individual) **for the purpose of engaging in** (sexual intercourse) (sexually explicit conduct) (or) (deviate sexual activity);

Third, that _____ *(defendant)* **was twenty-one (21) years of age or older at the time of the offense; and**

Fourth, that *(defendant)* **did so knowingly.**]

Definitions

"Knowingly"—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purpose"—A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels they would be helpful to the jury. *See* Definitions at beginning of this chapter.

Use this instruction with AMCI 2d 8101 and 8301-VF in Stage One, and in Stage Two, use with Class C felony sentencing instructions.

See Comment concerning circumstance in which offense is a Class A felony in which case AMCI 2d 2705-EXP and 2705-VF should be used if there is a factual issue as to whether the defendant actually met with the child.

COMMENT

Ark. Code Ann. § 5-27-306. Definitions for this offense are found in Ark. Code Ann. § 5-27-601 and appear in the Definition Section at the beginning of this chapter. "Knowingly" and "purpose" are defined in Ark. Code Ann. § 5-2-202.

The offense of internet stalking of a child is a Class B felony if the defendant attempts to arrange a meeting with a child fifteen (15) years of age or younger or an individual that the person believes to be fifteen (15) years of age or younger even if a meeting with the child never takes place. Internet stalking of a child is a Class A felony if the defendant arranges a meeting with a child fifteen (15) years of age or younger and an actual meeting with the child takes place even if the person fails to engage the child in any sexual activity.

The statute provides that it shall not apply to a person or entity providing an

electronic communications service to the public that is used by another person to violate this section unless the person or entity providing an electronic communications service to the public: (1) conspires with another person to violate this section; or (2) knowingly aids and abets the violation of this section.

AMCI 2d 2705-EXP

INTERNET STALKING OF A CHILD STAGE ONE VERDICT EXPLANATION—MULTIPLE POSSIBLE VERDICTS

If you find _____*(defendant)* guilty of internet stalking of a child or an individual believed to be a child, you will so indicate on the verdict form provided to you. You will also make additional findings about the offense.

If you reach a verdict of not guilty, you will indicate this on the form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 2705 and 2705-VF where there is a factual issue as to whether the defendant actually met with the child. See Ark. Code. Ann. § 5-27-306(b)(2). Internet stalking of a child is a Class Y felony if the defendant arranges a meeting with a child fifteen (15) years of age or younger or an individual believed to be a child and an actual meeting with the child takes place even if the person fails to engage the child in any sexual activity.

AMCI 2d 2705-VF

INTERNET STALKING OF A CHILD STAGE ONE VERDICT FORM—MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____*(defendant)* is guilty of internet stalking of a child.

_____

FOREMAN

We, the Jury, find _____*(defendant)* not guilty.

_____

FOREMAN

If your verdict is guilty, you shall complete the following:

Do you, the Jury, find beyond a reasonable doubt that *(defendant)* actually met with the child (individual believed to be a child)?

YES _____

NO _____

_____

FOREMAN

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 2705 and 2705-EXP where there is a factual issue as to whether the defendant actually met with the child or individual believed to be a child. *See* Ark. Code. Ann. § 5-27-306 (b)(2). Internet stalking of a child is a Class Y felony if the defendant arranges a meeting and an actual meeting with the child takes place even if the person fails to engage the child in any sexual activity.

AMCI 2d 2706

TRANSPORTATION OF A MINOR FOR PROHIBITED SEXUAL CONDUCT

_____*(Defendant)* **is charged with the offense of transporting a minor for prohibited sexual conduct. To sustain this charge, the State must prove the following things beyond a reasonable doubt:**

FIRST: that _____ *(defendant)* (transported) (financed in whole or part the transportation of) (or) (caused or facilitated the movement of) **a minor**;

SECOND: that _____ *(defendant)* **knew or had reason to know that prostitution or sexually explicit conduct involving the minor would be commercially exploited by any person; and**;

THIRD: that _____ *(defendant)* **acted with the purpose that the minor would engage in** (prostitution) or (sexually explicit material).

Definitions

"Commercial exploitation."—Having monetary or other material gain as a direct or indirect goal.

"Knowingly."—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Minor."—A person who is less than 18 years of age.

"Purpose."—A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

"Sexually explicit conduct."—Actual or simulated:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Sadomasochistic abuse for the purpose of sexual stimulation; or

(E) Lewd exhibition of the genitals or pubic area of any person or the breast of a female.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-27-305. "Purpose" and "knowingly" are defined in Ark. Code. Ann. § 5-2-202. For the definition of "minor," *see, e.g.*, Ark. Code Ann

§§ 5-25-101, 5-27-221. "Commercial exploitation" and "sexually explicit conduct" are defined in Ark. Code Ann. § 5-27-302.

Transportation of a minor for prohibited sexual conduct is a Class A felony.

AMCI 2d 2707

SEXUAL GROOMING OF A CHILD

_____ (*Defendant*) **is charged with the offense of sexual grooming of a child. To sustain this charge, the State must prove the following things beyond a reasonable doubt:**

FIRST, that _____ (*defendant*) knowingly [allowed a child thirteen years of age or younger to view] [(exposed) (furnished to) (presented to) (sold to) (or) (otherwise distributed to) a child thirteen years of age or younger], with or without consideration, a visual or print medium depicting sexually explicit conduct; and

SECOND, _____ (he) (she) did so with the purpose to entice, induce, or groom the child to engage in [sexual intercourse] [sexually explicit conduct] [or] [deviate sexual activity] with a person.

[It is not a defense to this offense that _____ (*defendant*) did not know the age of the child or believed the child was fourteen years of age or older.]

Definitions

"Knowingly."—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purpose."—A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

"Sexually explicit conduct."—Actual or simulated:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Sadomasochistic abuse for the purpose of sexual stimulation; or

(E) Lewd exhibition of the genitals or pubic area of any person or the breast of a female.

"Deviate sexual activity."—means any act of sexual gratification involving [the penetration, however slight, of the (anus) (or) (mouth) of one person by the penis of another person] [the penetration, however slight, of the (labia majora) (or) (anus) of one person by (any body member of) (or) (foreign instrument manipulated by) another person.]

"Sexual intercourse."—means penetration, however slight, of the labia majora by a penis.

"Visual or print medium."—means any film, photograph, negative, slide, book,

magazine, magnetic image, electronic image, or other visual or print medium other than material specifically used by a licensed medical professional or mental health professional, or both, for the purpose of assessment, evaluation, and treatment of a sex offender.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

If there are fact questions about the age of the defendant, the instruction will need to be modified.

COMMENT

Ark. Code Ann. § 5-27-307. "Purpose" and "knowingly" are defined in Ark. Code. Ann. § 5-2-202. "Sexually explicit conduct" is defined in Ark. Code Ann. § 5-27-302.

Sexual grooming of a child is a Class D felony if the defendant is twenty-one years of age or older, or a Class A misdemeanor if he or she is younger than twenty-one years of age.

It is not a defense to prosecution under this section that the actor does not know the age of the child or believes the child is fourteen (14) years of age or older.

It is an affirmative defense that the defendant was not more than three years older than the victim. *See* AMCI 2d 1401-AD.

AMCI 2d 2708

ENGAGING CHILD IN SEXUALLY EXPLICIT CONDUCT FOR USE IN VISUAL OR PRINT MEDIUM

_____ *(Defendant)* **is charged with the offense of engaging a child in sexually explicit conduct for use in visual or print medium. To sustain this charge, the State must prove the following things beyond a reasonable doubt:**

[FIRST, _____ (*defendant*) **was 18 years or older; and**

SECOND, _____ (he) (she)

(employed, used, persuaded, induced, enticed, or coerced a child to engage in)

(or)

(had a child assist another person to engage in)

sexually explicit conduct for the purpose of producing visual or print medium depicting the sexually explicit conduct.]

[FIRST, _____ (*Defendant*) **was a parent, legal guardian, or person having custody or control of a child; and**

SECOND, _____ (he) (she) knowingly permitted the child (to engage in) (or) (to assist another person to engage in) **sexually explicit conduct for the purpose of producing visual or print medium depicting the sexually explicit conduct.]**

Definitions

"Child" means any person under 18 years of age.

"Knowingly"—A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

"Purpose"—A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

"Sexually explicit conduct"—Actual or simulated:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Sadomasochistic abuse for the purpose of sexual stimulation; or

(E) Lewd exhibition of the genitals or pubic area of any person or the breast of a female.

"Visual or print medium" means any film, photograph, negative, slide, book, magazine, magnetic image, electronic image, or other visual or print medium

other than material specifically used by a licensed medical professional or mental health professional, or both, for the purpose of assessment, evaluation, and treatment of a sex offender.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that they will be helpful to the jury.

COMMENT

Ark. Code Ann. § 5-27-303. "Purpose" and "knowingly" are defined in Ark. Code. Ann. § 5-2-202. "Child" and "visual and print medium" are defined in § 5-27-302.

For the first offense, engaging in sexually explicit conduct for use in visual or print medium is a Class B felony. For a subsequent offense, it is a Class A felony.

CHAPTER 28

ABUSE OF ENDANGERED PERSON

SYNOPSIS

2801. Abuse Of Endangered Or Impaired Person

2802. Abuse Of Endangered Or Impaired Person [Class B Felony]

2803. Abuse Or Neglect Of Endangered Or Impaired Person [Class D Felony]

2804. Abuse Or Neglect Of Endangered Or Impaired Person [Class B Misdemeanor]

2805. Exploitation Of Endangered Or Impaired Person

2805-EXP. Exploitation Of Endangered Or Impaired Person Stage One Verdict Explanation—Multiple Possible Verdicts

2805-VF. Exploitation Of Endangered Or Impaired Person Stage One Verdict Form—Multiple Possible Verdicts

AMCI 2d 2801
ABUSE OF ENDANGERED OR IMPAIRED PERSON

DEFINITIONS

Definitions to be used for instructions in this chapter in cases of abuse of an endangered or impaired person, include the following:

"Abuse" means:

(A) Any purposeful and unnecessary physical act which inflicts pain on or causes injury to an endangered or impaired person;

(B) Any purposeful or demeaning act that a reasonable person would believe subjects an endangered or impaired person, regardless of age, ability to comprehend, or disability, to ridicule or psychological injury in a manner likely to provoke fear or alarm; or

(C) Any purposeful threat that a reasonable person would find credible and non-frivolous to inflict pain on or cause injury to an endangered or impaired person except in the course of medical treatment or for justifiable cause; or

(D) With regard to any adult resident of a long-term care facility by a caregiver, any purposeful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish.

"Adult maltreatment" means adult abuse, exploitation, neglect, physical abuse, or sexual abuse.

"Caregiver" means a related or unrelated person, owner, agent, high managerial agent of a public or private organization, or a public or private organization that has the responsibility for the protection, care, or custody of an endangered or impaired [adult] as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court.

"Endangered person" means:

(A) An adult eighteen (18) years of age or older who is found to be in a situation or condition which poses an imminent risk of death or serious bodily harm to that person and who demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition; or

(B) A resident of a long-term care facility who is found to be in a situation or condition which poses an imminent risk of death or serious bodily harm to the person and who demonstrates the lack of capacity to comprehend the nature and consequences of remaining in that situation or condition.

"Exploitation" means:

(A) The illegal or unauthorized use or management of an endangered or impaired [adult's] funds, assets, or property or the use of an endangered or impaired [adult's] person, power of attorney, or guardianship for the profit or advantage of himself, herself, or another; or

(B) Misappropriation of property of an adult resident of a long-term care

facility, which means the deliberate misplacement, exploitation, or wrongful, temporary, or permanent use of a resident's belongings or money without the resident's consent.

"Imminent danger to health or safety" means a situation in which death or severe bodily injury could reasonably be expected to occur without intervention.

"Impaired person" means:

(A) A person eighteen (18) years of age or older who, as a result of mental or physical impairment, is unable to protect himself or herself from abuse, sexual abuse, neglect, or exploitation, and as a consequence thereof is endangered.

(B) Residents of a long-term care facility are presumed to be impaired persons.

"Long-term care facility" means:

(A) A nursing home;

(B) A residential care facility;

(C) A post-acute head injury retraining and residential facility;

(D) Any facility which provides long-term medical or personal care;

(E) An intermediate care facility for the mentally retarded; or

(F) An assisted living facility.

"Long-term care facility resident" means a person, regardless of age, living in a long-term care facility.

"Long-term care facility resident maltreatment" means abuse, exploitation, neglect, physical abuse, or sexual abuse of a resident of a long-term care facility.

"Neglect" means:

(A) Acts or omissions by an endangered or impaired person, for example, self-neglect; or

(B) Purposeful acts or omissions by a caregiver responsible for the care and supervision of an endangered or impaired [adult] constituting:

(i) Negligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired [adult];

(ii) Negligently failing to report health problems or changes in health problems or changes in the health condition of an endangered or impaired [adult] to the appropriate medical personnel;

(iii) Negligently failing to carry out a prescribed treatment plan; or

(iv) Negligently failing to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness as defined in regulations promulgated by the Office of Long-Term Care of the Division of Medical Services of the Department of Human Services to an adult resident of a long-term care facility.

"Physical injury" means the impairment of a physical condition or the infliction of substantial pain.

"Serious bodily harm" means physical abuse, sexual abuse, physical injury, or serious physical injury.

"Serious physical injury" means physical injury to an endangered or impaired person that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

"Sexual abuse" means deviate sexual activity, sexual contact, or sexual intercourse with another person who is incapable of consent because he or she is mentally defective, mentally incapacitated, or physically helpless.

"Deviate sexual activity" means any act of sexual gratification involving:

(A) The penetration, however slight, of the anus or mouth of one person by the penis of another person; or

(B) The penetration, however slight, of the labia majora or anus of one person by any body member or foreign instrument manipulated by another person.

"Mentally defective" means that a person suffers from a mental disease or defect which renders the person: (A) Incapable of understanding the nature and consequences of sexual acts; or (B) Unaware the sexual act is occurring.

A determination that a person is mentally defective shall not be based solely on the person's intelligence quotient.

"Mentally incapacitated" means that a person is temporarily incapable of appreciating or controlling the person's conduct as a result of the influence of a controlled or intoxicating substance:

(A) Administered to the person without the person's consent; or

(B) Which renders the person unaware the sexual act is occurring.

"Physically helpless" means that a person is: (A)(i) Unconscious; or

(ii) Physically unable to communicate lack of consent; or

(B) Rendered unaware the sexual act is occurring.

"Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female.

"Sexual intercourse" means penetration, however slight, of the labia majora by a penis.

NOTE ON USE

Insert definitions in instructions in this Chapter for abuse of endangered or impaired persons when appropriate.

COMMENT

Ark. Code Ann. § 5-28-101. See Ark. Code Ann. § 5-14-101 for the following

definitions: "deviate sexual activity, mentally defective, mentally incapacitated, physically helpless, sexual contact, and sexual intercourse."

AMCI 2d 2802
ABUSE OF ENDANGERED OR IMPAIRED PERSON [CLASS B FELONY]

_____ (Defendant) **is charged with the offense of abusing an** (endangered) (or) (impaired) **person. To sustain this charge, the State must prove the following things beyond a reasonable doubt:**

First: That _____ (victim) **was an** [endangered [or] [impaired] person; and

Second: That [_____ (defendant)] [or] [_____ (defendant), a caregiver to _____ (victim),]

purposely abused _____ (victim) **causing** [serious physical injury] [or] [substantial risk of death] to (him)(her).

Definitions

"Purposely."—A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

Insert definitions from AMCI 2d 2801 for relevant terms, such as "abuse," "caregiver," "endangered person," "impaired person," "serious physical injury," etc.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels it would be helpful to the jury. Definitions may be found in AMCI 2d 2801.

Adult residents of a long-term care facility are presumed to be impaired adults. See AMCI 2d 205 to formulate proper instructions concerning statutory presumptions.

For the requirements of a licensed long-term care facility, refer to Ark. Code Ann. § 20-10-224.

Use AMCI 2d 2802 when a Class B felony is charged, AMCI 2d 2803 when a Class D felony is charged, or AMCI 2d 2804 when a Class B misdemeanor is charged. If the evidence affords the jury a rational basis for acquitting the defendant of the offense charged and convicting the defendant of a lesser included offense, the jury should be instructed on the lesser included offense and AMCI 2d 8301-VF should be modified to permit the jury to find the grade of the offense.

COMMENT

Ark. Code Ann. § 5-28-103. Definitions related to this offense appear in Ark. Code Ann. § 5-28-101. "Purposely" is defined in Ark. Code Ann. § 5-22-202.

Abuse of an endangered or impaired person may be a Class B felony, Class D felony or Class B misdemeanor.

AMCI 2d 2803
ABUSE OR NEGLECT OF ENDANGERED OR IMPAIRED PERSON [CLASS D FELONY]

_____ (Defendant) is charged with the offense of [abusing] [neglecting] an (endangered) (or) (impaired) **person. To sustain this charge, the State must prove the following things beyond a reasonable doubt:**

First: That _____ (victim) **was an** [endangered] [or] [impaired] person; and

Second: That [_____ (defendant)] [or] [_____ (defendant), a caregiver to _____ (victim),]

[purposely abused _____ (victim) causing physical injury to (him) (her).]

[or]

[neglected _____ (victim) causing (serious physical injury) (or) (substantial risk of death) to (him) (her).]

Definitions

"Purposely."—A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

Insert definitions from AMCI 2d 2801 for relevant terms, such as "abuse," "caregiver," "endangered person," "impaired person," "neglected," "physical injury," "serious physical injury," etc.

NOTE ON USE

See the Note on Use to AMCI 2d 2802. This form is for use for offenses constituting a Class D felony.

COMMENT

See the Comment to AMCI 2d 2802.

AMCI 2d 2804
ABUSE OR NEGLECT OF ENDANGERED OR IMPAIRED PERSON [CLASS B MISDEMEANOR]

_____ (Defendant) is charged with the offense of [abusing] [neglecting] an (endangered) (or) (impaired) **person. To sustain this charge, the State must prove the following things beyond a reasonable doubt:**

First: That _____ (victim) **was an** [endangered] [or] [impaired] person;

Second: That [_____ (defendant)] [or] [_____ (defendant), a caregiver to _____ (victim),]

[neglected _____ (victim) causing physical injury to (him)(her).]

[abused _____ (victim).]

Definitions

Insert definitions from AMCI 2d 2801 for relevant terms, such as "abuse," "caregiver," "endangered person," "impaired person," "neglected," "physical injury," etc.

NOTE ON USE

See the Note on Use to AMCI 2d 2802. This form is for use for offenses constituting a Class B misdemeanor.

COMMENT

See the Comment to AMCI 2d 2802.

AMCI 2d 2805
EXPLOITATION OF ENDANGERED OR IMPAIRED PERSON

_____ (Defendant) **is charged with the offense of exploiting an** [endangered] [or] [impaired] **person. To sustain this charge, the State must prove the following things beyond a reasonable doubt:**

[First: That _____ (victim) **was an** (endangered) (or) (impaired) **person; and**

Second: That (_____ (defendant)) (or) (_____ (defendant), a caregiver to _____ (victim),) ([illegally] [or] [without authorization] [used] [or] [managed] _____'s [victim's] [funds] [assets] [or] [property].)

(or)

(used _____'s [victim's] [person] [power of attorney] [or] [guardianship] **for the profit or advantage of** [(him)(her)self] [or] [another person].)

[or]

[First: That _____ (victim) **was an** (endangered) (or) (impaired) **person**;

Second: That _____ (victim) **was a resident of a long-term care facility; and**

Third: That (_____ (defendant)) (or) (_____ (defendant), a caregiver to _____ (victim),) (deliberately misplaced) (exploited) (or) (wrongfully used (temporarily (or) (permanently)) _____ (victim's) (belongings) (or) (money) **without** (his)(her) **consent**.]

Definitions

Insert definitions from AMCI 2d 2801 for relevant terms, such as "caregiver," "endangered person," "exploited," "impaired person," etc.

NOTE ON USE

Definitions should be given when requested by counsel or when the court feels that it would be helpful for the jury. See AMCI 2d 2801 for definitions to be used with the instruction.

This instruction should be used in conjunction with AMCI 2d 2805-EXP and 2805-VF if the evidence affords the jury the option of selecting a verdict from the alternatives provided therein.

COMMENT

Ark. Code Ann. § 5-28-103(e). Definitions related to the offenses designated as abuse of an endangered or impaired are found at Ark. Code Ann. § 5-28-101.

Exploitation may be a Class B felony or Class A misdemeanor.

AMCI 2d 2805-EXP
EXPLOITATION OF ENDANGERED OR IMPAIRED PERSON STAGE ONE VERDICT EXPLANATION—MULTIPLE POSSIBLE VERDICTS

If you find _____ *(defendant)* guilty of exploiting an *[endangered] [or] [impaired]* person, you will so indicate on the verdict form provided you. You will also make a finding about the circumstances of the offense as directed on the form.

If you reach a verdict of not guilty, you will indicate this on the verdict form.

NOTE ON USE

This instruction should be used in conjunction with AMCI 2d 2805 and 2805-VF where the evidence affords the jury a rational basis for selecting a verdict from the alternatives set out. In other cases, use AMCI 2d 2805 in conjunction with AMCI 2d 8101 and 8301-VF.

AMCI 2d 2805-VF
EXPLOITATION OF ENDANGERED OR IMPAIRED PERSON STAGE ONE VERDICT FORM—MULTIPLE POSSIBLE VERDICTS

We, the Jury, find beyond a reasonable doubt that _____ (defendant) is guilty of exploiting an [endangered] [or] [impaired] person.

_____
FOREMAN

We, the jury, find _____ (defendant) not guilty.

_____
FOREMAN

If your verdict is guilty, you shall make one of the following findings:

We, the Jury, find beyond a reasonable doubt that:

The value of the property, assets or resources was more than $500.

_____
FOREMAN

The value of the property, assets or resources was $500 or less.

_____
FOREMAN

NOTE ON USE

This verdict form should be used only in conjunction with AMCI 2d 2805-EXP. If a verdict of guilty is returned, the appropriate standard punishment instruction and verdict form should be use in Stage Two.

COMMENT

Exploitation is a Class B felony when the value of the property, assets or resources is more than $500 and a Class A misdemeanor when $500 or less.

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